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FLOYD A. DEMANES



REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

C. P. POMEROY,
REPORTER.

VOLUME 119.

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ORGANIZATION OF SUPREME COURT.

[Constitution, article 6, section 2.]

§2. The Supreme Court shall consist of a chief justice and six associate justices. The court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and

set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

SUPREME COURT COMMISSIONERS.

[Statutes 1897, page 47.]

SECTION 1. The Supreme Court of the State of California shall immediately upon the expiration of the term of office of the present Supreme Court Commissioners appoint five persons of legal learning and personal worth as Commissioners of said Court. It shall be the duty of said Commissioners, under such rules and regulations as said Court may adopt, to assist in the performance of its duties and in the disposition of the numerous causes now pending in said Court undetermined. The said Commissioners shall hold office for the term of two years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a Judge of said Court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States, and the Constitution of the State of California, and to faithfully discharge the duties of the office of Commissioner of the Supreme Court to the best of their ability. The said Court shall have power to remove any and all members of said Commission at any time by an order entered on the minutes of said Court, and all vacancies in said Commission shall be filled in like manner.

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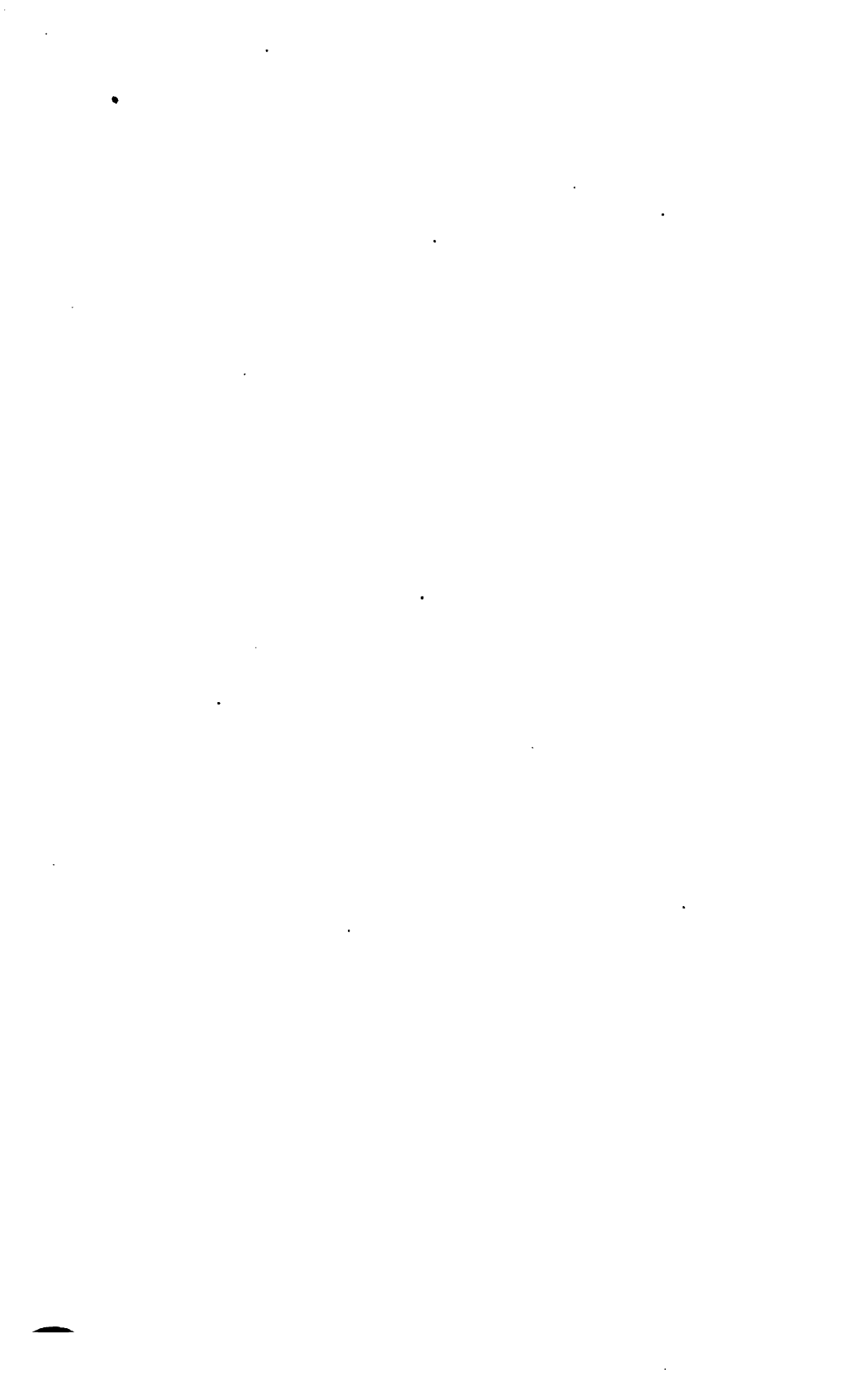
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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

[Crim. No. 258. Department Two.—November 2, 1897.]

THE PEOPLE, Respondent, v. J. C. SIMMONS, Appellant.

CRIMINAL LAW—APPEAL—REVIEW OF MOTION TO SET ASIDE INDICTMENT—BILL OF EXCEPTIONS.—An order denying a motion to set aside an indictment is not appealable; but such order may be reviewed upon appeal from the judgment, where the proceedings are brought up by a bill of exceptions.

ID.—DISQUALIFICATION OF GRAND JUROR—CHALLENGE TO PANEL—LEGALITY OF INDICTMENT—ABSENCE OF GRAND JUROR.—The disqualification of an individual grand juror is not ground for a challenge to the panel; nor can the absence of a grand juror, whether qualified or disqualified, during the consideration of a case by the grand jury, affect the validity or legality of its action; and an indictment cannot be set aside for the disqualification of a juror, in the finding of which he took no part.

APPEAL from a judgment of the Superior Court of Sonoma County, and from an order denying a new trial, and from an order denying a motion to dismiss an indictment. R. F. Crawford, Judge.

The facts are stated in the opinion.

Ross Campbell, for Appellant.

W. F. Fitzgerald, Attorney General, and W. H. Anderson, Assistant Attorney General, for Respondent.

HAYNES, C.—Appellant was indicted by the grand jury of Sonoma county for the crime of incest. The indictment was set

aside upon defendant's motion upon the ground that one of the grand jurors was incompetent, in that he had not been assessed on the last assessment-roll of said county. Thereupon the court resubmitted the case to the same grand jury, but directed Mr. Ramage, the incompetent juror, not to be present or participate in the examination of the case. This instruction was obeyed, and the grand jury found and returned a new indictment for the same offense. Defendant thereupon objected to the panel, and moved to set aside the new indictment upon the ground that the grand jury was illegal and not impaneled in the manner required by law, in that there were only eighteen legal and competent grand jurors, Ramage being incompetent. This motion was denied, and defendant excepted. A trial was had and the defendant was found guilty and sentenced to imprisonment for the term of ten years. This appeal is from the order denying said motion, and also from an order denying his motion for a new trial based upon the same grounds, and also from the judgment.

The only question made or argued in appellant's brief is that presented by his said motion to dismiss the indictment, and which is also presented by his motion for a new trial, which was based solely upon that ground.

We concur in the views of the learned attorney general that the order denying the motion to set aside the indictment is not appealable (Pen. Code, sec. 1237), and that the motion for a new trial was not made upon any of the statutory grounds upon which alone such motion must be based. (Pen. Code, sec. 1181.) There is, however, an appeal from the judgment, and section 1259 of the Penal Code provides: "Upon an appeal taken by defendant from a judgment, the court may review any intermediate order or ruling" involving the merits, or which may have affected the judgment."

As the motion, if granted, would have affected the judgment, the order may be reviewed on this appeal from the judgment, the proceedings having been brought up by bill of exceptions.

Appellant bases his motion upon subdivision 4 of section 995 of the Penal Code, which provides that an indictment may be set aside on motion "when the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror."

The defendant, not having been held to answer said charge, was in a position to avail himself of the privilege given by said provision; but it is clear that the objection to the juror, Ramage, is not ground for an objection to the panel. Section 895 of the Penal Code provides: "A challenge to the panel may be interposed for one or more of the following causes only: 1. That the requisite number of ballots was not drawn from the jury box of the county; 2. That notice of the drawing of the grand jury was not given; 3. That the drawing was not had in the presence of the officers designated by law."

The panel was therefore valid, even if it be conceded that Ramage was not a competent grand juror, the full number having been drawn and impaneled as a grand jury.

Section 192 of the Code of Civil Procedure declares that "a grand jury is a body of men, nineteen in number, returned in pursuance of law." If any twelve concur, an indictment may be found, though the remainder of the jury vote against it.

Appellant's contention here is that the incompetency of one grand juror reduces the panel below the number required to be drawn to constitute it, and that the remaining eighteen could do not act as a grand jury. This contention is disposed of by the case of *People v. Hunter*, 54 Cal. 65. There a grand juror died, thus reducing the panel below the statutory number, and it was contended that the remaining eighteen could not act; in other words, that the death of a juror dissolved the grand jury; but this court held that the indictment found after the death of the juror was valid. For the reasons and authorities upon which that conclusion was based we refer to the case itself without any attempt at repetition or condensation.

A similar question was involved in *People v. Hecht*, 105 Cal. 621; 45 Am. St. Rep. 96. In that case a board of fifteen freeholders was elected to prepare a charter for the city of San Francisco, pursuant to section 8, of article XI, of the constitution, which required that said freeholders should have been for at least five years qualified electors of said city. Two of the persons elected as members of said board were not such qualified electors. The proceeding was *quo warranto*, the relator contending that as but thirteen qualified persons were elected the board had no legal existence and was not qualified to act.

This court held to the contrary. The reasoning of the opinion in that case strongly supports our conclusion in the case before us that the grand jury which found the indictment against appellant was a legal body notwithstanding the disqualification of Mr. Ramage.

In view of the conclusion reached, it is not necessary to consider whether Mr. Ramage was in fact disqualified as a grand juror, for, if he was qualified, his absence during the consideration of the case by the grand jury did not affect the validity of its action. (*People v. Roberts*, 6 Cal. 214; *People v. Gatewood*, 20 Cal. 146; *People v. Hunter*, *supra*.)

We advise that the judgment and orders appealed from be affirmed.

Chipman, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

McFarland, J., Henshaw, J., Temple, J.

[S. F. No. 626. Department Two.—November 2, 1897.]

CHARLES D. WHEAT, Receiver, Appellant, v. BANK OF CALIFORNIA, Respondent.

PARTNERSHIP—DISSOLUTION AND ACCOUNTING — INTERVENTION — DISPUTE AS TO PERSONS CONSTITUTING PARTNERSHIP—JUDGMENT FOR INTERVENORS—POWER OF RECEIVER—ACTION AGAINST BANK.—A receiver appointed at the instance of plaintiff in an action for an accounting and dissolution of an alleged partnership between plaintiff and defendant, to collect the assets of that partnership, has no power to institute an action against a bank to recover the proceeds of the sales of property belonging to a partnership between the defendant and one who had intervened in the action for an accounting and dissolution of partnership, averring that he was a partner with defendant in the alleged partnership business, and that plaintiff was not such partner, and in whose favor judgment had been rendered prior to the commencement of the action by the receiver, for a dissolution and accounting of the partnership between the intervenor and the defendant; and where such receiver, in the action against the bank, alleged special authority to collect such proceeds of sales as were held by the bank, a finding against such authority, which has support in the evidence, is fatal to any recovery by the receiver against the bank.

ID.—PROMISE OF BANK TO INTERVENOR—WANT OF CONSIDERATION—NOTICE BY INTERVENOR—STATUS OF RECEIVER AND BANK NOT AFFECTED.—A promise made by the cashier of the bank to the intervenor and his attorney, that he would hold the fund sought to be recovered by the receiver until the litigation was fully determined, not supported by any consideration, is of no binding force and effect; and neither such promise, nor any notification given by the intervenor to the bank that he was a party to the litigation, and claimed an interest in the funds held by the bank, whatever rights purely personal to himself might be created thereby, could in any way affect the legal status between the receiver and the bank.

FINDINGS—SUPPORT BY EVIDENCE—REVIEW UPON APPEAL.—Where a finding which absolutely points the judgment against the appellant is supported by the evidence, the fact that other findings are not supported by the evidence becomes immaterial, and is not ground of reversal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

George A. Rankin, and Henry E. Highton, for Appellant.

James M. Allen, for Respondent.

GAROUTTE, J.—Jones brought an action against Richter, alleging a partnership in the business of selling street railway cables, and asked for the appointment of a receiver, an accounting, and a decree of dissolution. Subsequently Seale intervened, setting out that he was a partner of Richter in the business of selling cables, and that Jones was not. He also asked for an accounting and a dissolution of the partnership. Upon the aforesaid application of Jones one Bisbee was appointed receiver by the judge, "to collect, . . . the outstanding debts and moneys due, or to become due, on account of the partnership alleged in the complaint herein to exist between plaintiff and defendant," and to receive and take possession of all the property of said partnership upon filing a bond, etc. Soon after the intervention of Seale there came into the possession of the Bank of California about two thousand six hundred dollars, the net proceeds of the sales of two cables. This money was held under a certificate of deposit made out in favor of Thomas Brown, cashier. Bisbee, the receiver, notified the bank of his appointment.

Seale and his attorney notified the bank that, he, Seale, was a partner with Richter in the business of selling cables, and that he had filed a complaint in intervention in the litigation between Jones and Richter, and instructed Brown, the cashier of the bank, not to pay out the money held by the bank until the final result of the litigation was declared. It is now claimed by Seale and his attorney that Brown so agreed to do. Thereafter Bisbee, the assignee, died, and Wheat, the present plaintiff, was appointed in his stead, "with the same powers conferred on his predecessor." Pending the application for the appointment of Wheat, Jones and Richter, in company with their attorneys, presented themselves to the Bank of California, and upon representing that their differences had been settled, the certificate of deposit was turned over to them, and the proceeds divided. Wheat thereafter being appointed assignee, brought this action against the bank to recover the money represented by the certificate. Prior to the commencement of the action the partnership litigation between Jones, Richter, and Seale had come to judgment, and by that judgment it was declared that Jones was not a partner with Richter in the cable business, but that Seale was such partner.

There appears to be some evidence in the record appertaining to an injunction issued in an action entitled *Bisbee v. Richter*, but we attach no importance to it. Likewise we attach no importance to the promise made by Brown to Seale and his attorney (conceding there was such a promise), that he, Brown, would hold the money until the litigation was finally determined. There was no consideration for such a promise, and it had no binding force and effect. From the standpoint at which we view the case it is unnecessary to consider whether or not liabilities and rights were fixed by the notification given to Brown by Seale and his attorney, to the effect that Seale was a party to the litigation and claimed an interest in the fund. If Seale created rights in his behalf by the course adopted, they were rights purely personal to himself, and in no way affected the legal status existing between the receiver and the bank.

Plaintiff Wheat, as receiver, now brings this action to recover from the bank the sum held by it as the net proceeds of certain cable sales. He is not authorized to bring the action; his powers

are not broad enough. Those powers are measured by the order of the judge appointing him receiver; and by that order he is only authorized to deal with the property of the partnership of Jones and Richter. It is conceded by appellant that the property involved in this litigation was the property of the partnership of Richter and Seale. The receiver, under the order appointing him, had no power to collect or sue for the property of that partnership, and necessarily must fail in this action for that reason. The complaint states that Bisbee was appointed receiver with power to receive, collect, take, and keep possession of all the property and assets of said partnership, "*and especially of all the proceeds of the sales of said wire cables mentioned in said action.*" This allegation was most material to the statement of a cause of action, and an absence of it would have been fatal to the sufficiency of the pleading. Yet plaintiff wholly failed at the trial to prove that the receiver had any power or control whatever over the proceeds of the sales of said cables. And the finding of the court as to that fact is directly opposed to this allegation of the complaint.

It is further claimed by the appellant that many of the findings of the court are without support in the evidence. Let the claim be conceded, still the finding to which we have referred has support in the evidence, and that finding absolutely points the judgment against appellant, whatever may be the real facts as to other matters alleged in the complaint.

For the foregoing reasons the judgment and order are affirmed.

McFarland, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion on the 2nd of December, 1897:

BEATTY, C. J.—I dissent from the order denying a rehearing in this cause. The only point decided by the court is that neither Bisbee, nor his successor in the receivership, ever had title to the fund in the hands of defendant. This decision is placed upon the ground that since the receiver was only authorized to take possession of the property of the partnership, alleged

by Jones to have existed between him and Richter, and since it was finally determined that there was no such partnership, he never got title to any property.

The order appointing the receiver is to be construed in the light of the circumstances as they existed at the time it was made and, when those circumstances are taken into account, I think the evidence is ample and uncontradicted to sustain the allegation printed in italics in the opinion of the court; the allegation, that is to say, that Bisbee was appointed with power to take and keep possession "especially of all the proceeds of the sales of said wire cables mentioned in said action."

When the order appointing Bisbee was made, there was nothing before the court except the complaint in *Jones v. Richter*, and the complaint being expressly referred to in the order, its contents are imported into the order so far as necessary for the purpose of construction.

Turning to the complaint in that action, we find that the only property specifically described in it is the fund (then in the hands of Falkner, Bell & Co., but subsequently transferred to the defendant) "arising out of said business," i. e., the sale of wire cables.

At the time of making the order, and long afterward, it was one of the points in dispute in *Jones v. Richter* whether or not those parties were in fact partners. But they were all the time "alleged" partners, and this fund was particularly described as the property of the "alleged partnership." There is no doubt that the court had jurisdiction over it from the beginning to the end of the litigation, before and after the intervention of Seale, and the only question is whether its order so described it on the day it was made that the receiver could have lawfully demanded its possession. That the description was sufficient for that purpose I cannot doubt. This particular fund was described in the complaint as a debt due to the partnership therein alleged, and by the terms of the order the receiver was to take possession of all "moneys due or to become due on account of the partnership alleged in the complaint herein."

[S. F. No. 449. Department Two.—November 2, 1897.]

**MARION A. BULLARD, Appellant, v. LOUIS KEMPF and
CORNELIA KEMPF, His Wife, Respondents.**

BOUNDARY OF LOT—DISPUTE AS TO DIVISION LINE—ACTION TO ENJOIN REMOVAL OF BULKHEAD — PRELIMINARY INJUNCTION — IMPROPER DISSOLUTION.—In an action to enjoin the removal of a bulkhead which for fourteen years had practically marked the division of occupation of adjacent lots of plaintiff and defendants, the defendants claiming the right to remove it, as occupying eight inches of defendants' lot, which claim was disputed by the plaintiff, a preliminary injunction should be allowed to stand until the trial, a dissolution of it being improper, as practically equivalent to a dismissal of the action before a trial upon the merits, where it is not made reasonably certain by the pleadings and affidavits that the attack upon plaintiff's title and right of occupation up to the existing bulkhead line would be ultimately successful.

ID.—DISPUTED TITLE—GROUND FOR INJUNCTION PENDENTE LITE—PRESERVATION OF PROPERTY.—The mere existence of a doubt as to the title does not of itself constitute sufficient ground for refusing an injunction; and the jurisdiction of the court to issue injunctions where the title is in dispute is asserted for the preservation of the property pending proceedings for the determination of the title of the parties.

ID.—IMPROVEMENTS BY FORMER OWNER OF ADJACENT LOTS—SALE OF IMPROVED LOTS—LOCATION OF BOUNDARIES—MONUMENTS CONTROLLING DISTANCES.—Where a former owner of adjacent lots improved them by the erection of houses, bulkheads, and fences, making each ready for occupancy, and sold them, putting persons in possession of the respective lots just as they were inclosed and improved, the boundary lines designated by the improvements, being the monuments fixed by the original survey and measurement of the adjacent lots by the common vendor, control the distances described in the deeds, and fix the actual location of the lines upon the ground.

ID.—DECLARATION OF VENDOR TO DEFENDANT—NONCOMMUNICATION TO PLAINTIFF.—A declaration made by the common vendor of the improved lots to one of the defendants at the time of his purchase, that the house which constituted part of the bulkhead was four inches from the east line, and that each of a row of houses erected by the same vendor was built four inches from the east line of the lots, so as to leave room for the overhanging gutterways, such declaration not having been communicated to plaintiff, is inadmissible to change or affect the lines marked by the common vendor upon the ground by the monuments erected thereon.

ID.—ACQUIESCENCE IN OCCUPATION BY MONUMENTS—EFFECT UPON PRELIMINARY INJUNCTION.—The long acquiescence of the defendants in the occupation of the adjacent lots according to the monuments erected thereon, aside from any question of its being a new source

of right, whether operating by estoppel or otherwise, should have great weight upon the question whether the preliminary injunction against the removal of the bulkhead line should be continued until the trial of the action permanently to enjoin its removal.

ID.—ADVERSE POSSESSION—TAXES—MONUMENTS CONTROLLING DESCRIPTION IN ASSESSMENT ROLL.—Where the fences constitute monuments which control the description in the deeds of adjacent lots, such monuments must also control the description in the assessment-roll, and the question of adverse possession and payment of taxes need not be considered.

APPEAL from an order of the Superior Court of the City and County of San Francisco dissolving a preliminary injunction. A. A. Sanderson, Judge.

The facts are stated in the opinion.

Dunne & McPike, for Appellants.

Olney & Olney, for Respondent.

HAYNES, C.—Plaintiff brought this action to enjoin the defendants from destroying or removing a bulkhead or retaining wall erected along the westerly side of her lot. Upon filing her complaint, a preliminary injunction was granted. The defendants answered, and upon their answer and affidavits moved for a dissolution of the injunction. The plaintiff filed affidavits in reply, and upon the hearing an order was made dissolving the injunction, and from that order the plaintiff appeals.

Plaintiff and defendant Cornelia respectively own adjacent lots in the city of San Francisco, and this controversy involves the location of the division line between them.

These lots front on the northerly line of Clay street, between Buchanan and Webster streets, and, with other lots contiguous thereto, were formerly owned by one Henry Hinkel, and prior to October 11, 1880, said Hinkel erected thereon a row of detached houses for the purpose of sale.

On the date last mentioned, Hinkel sold and conveyed one of said houses and lots to defendant Louis Kempff, who afterward conveyed to his wife, the defendant Cornelia. On November 9, 1880, Hinkel conveyed to W. P. Bullard, the husband of the plaintiff, the lot adjoining the Kempff lot on the east, and Bullard conveyed to the plaintiff.

The ground from Buchanan street on the east slopes downward to Webster street on the west, and the lots were terraced by Hinkel, who built each house on the east side of the lot, and built bulkheads, from the front thereof to the street, and from the rear thereof to the rear end of the lot, the houses themselves constituting or serving as a bulkhead so far as they extended. The difference in the level of the two lots here in question is about three feet.

These bulkheads were constructed by planting posts firmly in the ground with a cap on top and sills below, and putting boards perpendicularly on the outside— that is, the side next defendant's lot — extending from the surface of the lower lot to the height of about ten feet, and which thus constituted a fence above the bulkhead.

There was a like bulkhead at the westerly side of defendant's lot and at the easterly side of plaintiff's lot. The front of defendant's house is about eighteen feet from the street.

The deeds by which these lots were conveyed by Hinkel described them by metes and bounds, the several points of beginning being stated to be a point on the north line of Clay street a given number of feet and inches easterly from the east line of Webster street, the lots having each a frontage of twenty-seven feet and two inches, and a depth of one hundred and twenty-seven feet eight and one-quarter inches.

According to an affidavit made by A. H. Sanborn, a deputy of the city surveyor who recently surveyed defendant's lot, the gutterway of defendants' house projects about "four inches and to the true line" between the lots of plaintiff and defendant; that the bulkhead, which is about three feet high, extending from the front of the house to the street and from the rear of the house to the rear of the lot, is wholly upon the land described in defendants' deed as surveyed by him.

The affidavit of defendant Louis Kempff shows that the threatened removal or destruction of the bulkhead, stated in the complaint, was based upon the fact that he had made a contract with a workman to erect an artificial stone bulkhead "to the extreme eastern line" of defendants' lot as described in the deed, and the alleged threatened destruction of the existing bulkhead was for that purpose.

The affidavits further show that plaintiff and her husband entered upon the occupancy of their house and lot before defendants entered upon the actual occupancy of theirs, and that each party has ever since occupied their respective properties as marked by the bulkheads and fences.

In the affidavit of defendant Louis Kempff it is alleged that whenever said bulkhead needed repairs he repaired it at his own cost; "that plaintiff has made repairs upon said fence or bulkhead, but, saving and excepting said repairs, plaintiff has not, nor has any predecessor of hers, since the time of said Henry Hinkel, exercised any dominion over the same," and that defendants have never known until within the last two months that plaintiff claimed any interest in the land conveyed to deponent by Hinkel, or in the fence or bulkhead on said land.

In plaintiff's affidavit in reply she says that about seven years ago the defendant's workmen, in his absence, made some repairs on the bulkhead at the northerly portion; that she told the workmen to desist, but they completed the repairs notwithstanding her objections; that Mr. Kempff called upon her and said: "The workman made a mistake in repairing your fence, but the amount was small and he paid it himself." She further stated in said affidavit that there was a similar bulkhead at the western side of the defendants' lot, which defendant said he had to keep in repair. She further states that about two months before this suit was commenced defendants entered into negotiations for the sale of their property to one H. C. Crane; that Crane caused a survey of the lot to be made; that said survey showed that defendants were not in possession of a strip about eight inches wide along the easterly side of their lot upon which said bulkhead rested; that Crane refused to complete the purchase until he could be put in possession of the whole lot; that defendants then requested her to move the bulkhead and fence eastward eight inches, or to execute a quitclaim deed prepared by them, which described the lot as described in the deed from Hinkel; that she refused to do either; that she told Mr. Kempff that he knew she had always claimed and repaired the bulkhead, and that he and his wife had acquiesced for fourteen years and treated the bulkhead as the boundary; that Mr. Kempff replied "that neither he nor his wife knew that he or she owned anything on the east side of his

house until Crane had it surveyed." No reply was made to this affidavit.

In the affidavit of Louis Kempff it was further said that, during his negotiations with Hinkel for the purchase of his lot, Hinkel informed him that the "deed conveyed the land to about four inches east of the east line of the house, in order to give room for the projection of the roof or gutterway, so as not to infringe upon the adjoining lot."

Defendants also read an affidavit made by William Hinkel, who testified that he knew said row of houses built by his brother (now deceased), and also knew the plans in regard to the location of the houses, which was to leave about four inches space on the east side of the houses for the overhanging gutters.

It was stipulated that each lot was assessed according to the description contained in the deeds from Hinkel, that a valuation was put upon the real estate, and also upon the "improvements thereon," and the parties respectively had paid all the taxes so assessed.

I think the injunction should have been allowed to stand until the trial. The only relief sought in the case was an injunction to restrain the attempted removal of the bulkhead, and was not merely ancillary to other relief sought by the complaint, and its dissolution was practically equivalent to a dismissal of the action, since its mere pendency would not only not prevent a removal of the bulkhead and an encroachment upon the premises claimed by plaintiff, but would probably necessitate another and different form of action to finally determine the rights of the parties. Of course, there may be cases where the dissolution of a preliminary injunction would be proper notwithstanding a permanent injunction was the only relief sought, but I think this case is not one of them. The general proposition above stated is sustained in *Porter v. Jennings*, 89 Cal. 440, where numerous authorities are cited. "The mere existence of a doubt as to the title does not of itself constitute sufficient ground for refusing an injunction." (*Hunt v. Steese*, 75 Cal. 624; citing *Kerr on Injunctions*, 2d Am. ed., 13, and *Hess v. Winder*, 34 Cal. 270.) "It is the common practice at this day for the court to issue injunctions where the title is in dispute. . . . The jurisdiction of the court in these cases is asserted for the preservation of the

property pending proceedings at law for the determination of the title of the parties." (*LeRoy v. Wright*, 4 Saw. 535.) In *Hunt v. Steese*, *supra*, it was further said: "Not only should there be an answer to the merits, but it should be made reasonably certain by the pleadings and the affidavits that the attack upon the patent [plaintiff's title] will be ultimately successful."

I think the pleadings and affidavits in this case do not make it "reasonably certain" that defendant had a right to remove the bulkhead "eight inches in an easterly direction," as he attempted to do after he had demanded that plaintiff should do it. Mr. Hinkel, being the owner of these and other lots, improved them by the erection of houses, bulkheads, and fences, making each ready for occupancy, and sold them, putting the purchasers in possession of the respective lots just as they were inclosed and improved. No survey was made at the time of the sale of these respective lots, nor were the boundaries marked upon the ground otherwise than by the improvements. It may be inferred from the description contained in each deed that Hinkel had surveyed them, or at least had measured the distance from Webster street to the west line of each lot, but it does not appear that the lines had ever been marked upon the ground otherwise than by the improvements. In the absence of other controlling evidence, it must be presumed that the lines marked by the improvements correspond with and mark the lines as fixed by Hinkel's measurement or survey, and, assuming the city surveyor's measurement is precisely accurate, it only shows an error in Hinkel's measurement. But the lines designated by the improvements—they being the monuments fixed by the original survey—control distances, and fix the actual location upon the ground.

In *Penry v. Richards*, 52 Cal. 675, the lot in question was described by its number as shown on the official map. The court said: "The court below ignored the evidence tending to show the location of the Haley stakes, and decided the case upon the theory that the demanded premises were to be ascertained by running the courses and distances from the initial point of Haley's survey, without regard to the monuments by him erected. This was a violation of well-known principles applicable to the mode of ascertaining the true position of lands described in deeds of conveyance."

In *Diehl v. Zanger*, 39 Mich. 601, the controversy related to the line between adjacent lots. There were forty-eight lots in the subdivision. A resurvey was made, and the surveyor testified that "the fences and buildings on all the lots are not correctly located." Cooley, J., after stating that the surveyor reached his conclusion by satisfying himself what was the initial point of Campau's survey, and then proceeding to survey the plat anew with that as his starting point: "Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity. But no law can sanction this course. The surveyor has mistaken entirely the point to which his attention should have been directed. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. No rule in real estate law is more inflexible than that monuments control course and distance—a rule that we have frequently occasion to apply in the case of public surveys, where its propriety, justice, and necessity are never questioned. But its application in other cases is quite as proper, and quite as necessary to the protection of substantial rights. The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks set by Mr. Campau, and if those were discovered they must govern. If they are no longer discoverable the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known. As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are." (See, also, *Flynn v. Glenny*, 51 Mich. 580; *Le Compte v. Lueders*, 90 Mich. 495; 30 Am. St. Rep. 450, and note.)

In view of these authorities and the long acquiescence of the

parties, the court should, for the purposes of the motion, have held that the improvements as made and located by Hinkel marked the true line of division between the lots, leaving the question as to how far other facts and circumstances should be permitted to affect the line thus marked to be determined upon the trial. Counsel have discussed the case as though it had been tried, and the appeal was from the final judgment; whereas, in cases of this character, as we have seen, the preliminary injunction should be continued, unless it is reasonably certain that the plaintiff cannot sustain her title. We think the defendant has not overcome the apparent right of the plaintiff to have the bulkhead and fences remain as they are until the final trial, and it would not seem that defendant could complain if the court had so ordered, after a silent and uncomplaining acquiescence for fourteen years.

The question remains, however, whether our conclusions hereinbefore indicated are affected by the statement in the affidavit of Mr. Kempff, that at the time of his purchase he was informed by Mr. Hinkel that the house was four inches from the line, supported as that statement is by the affidavit of the brother of Mr. Hinkel that he knew the plan upon which the row of houses was built, viz., to erect the houses four inches from the east line of the lots, so as to leave room for the overhanging gutterway.

So far as the representation to Mr. Kempff is concerned, it is not claimed that he ever communicated it to Mr. or Mrs. Bullard, while the uncontradicted affidavit of the plaintiff is to the effect that defendants did not assert any claim to the now disputed strip until the survey was made by Mr. Crane, but that, on the contrary, they said they did not know until that survey was made that they owned anything on the east side of the house; and, as to the affidavit of Mr. Hinkel, the effect of it is to show that all the houses in the row—the number of which is not stated—were built on the same plan with reference to the lines of the several lots, and if defendants' contention should be sustained all would be involved, and the rights and possession of each of the other owners would be rendered uncertain and liable to litigation. Such a result should be avoided if legally possible. In the absence of any evidence that Hinkel gave like information to Bullard at the time of his purchase such evidence is inadmissible to change or affect the lines marked by Hinkel himself upon the ground by

the erection of the fences. It is inconsistent with the fact that he put the purchasers respectively in possession of all the ground within the lots as marked by the fences, and if, before accepting the deeds, they had procured an accurate survey to be made, each might well have objected that the deed tendered to him did not accurately describe the lot he had purchased.

I do not think it necessary to discuss the question of long acquiescence as the source of a right not originally possessed by the plaintiff, whether operating by way of estoppel, or otherwise; but it should have great weight upon the question whether the injunction should be continued until the trial.

So, too, upon the facts before us the question of adverse possession need not be considered, for if the fences constitute monuments which control the call in the respective deeds as to the distance from Webster street, each party has occupied only the ground conveyed to him; and if the monuments control the description in the deed, it must also control the description in the assessment roll.

I advise that the order appealed from be reversed with directions to the court below to deny the motion.

Belcher, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed, with directions to the court below to deny the motion.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 550. Department One.—November 3, 1897.]

ELIZABETH W. CARPENTER, Respondent, v. OSCAR LEWIS et al., Appellants.

MORTGAGE—DECREE OF FORECLOSURE — EXECUTION SALE OF DECREE INVALID—A judgment and decree foreclosing a mortgage cannot be levied upon and sold under execution, and an execution sale thereof is invalid and ineffectual to transfer such judgment and decree to the purchaser, who takes nothing thereby.

ID.—MORTGAGE BY DEED ABSOLUTE — IMPROPER RECORD OF DEFEASANCE — PROTECTION OF BONA FIDE PURCHASER.—Where a mortgage was made by deed absolute upon its face, and a defeasance executed by the grantee was not acknowledged by the grantee, but was merely acknowledged and recorded by the grantor, a bona fide purchaser from the mortgagee for value, without actual notice of the defeasance, or of the fact that the deed was intended as a mortgage, is protected under the provisions of sections 2925 and 2950 of the Civil Code, and became the real owner of the lot.

ID.—ENTRY OF DECREE OF FORECLOSURE—ABSENCE OF NOTICE OF LIS PENDENS—CONSTRUCTIVE NOTICE.—The pendency of an action for the foreclosure of a mortgage by deed absolute is not constructive notice to a *bona fide* purchaser from the mortgagee, where no notice of *lis pendens* appears of record; nor is such purchaser bound to take constructive notice of the mere entry of a decree of foreclosure in such action where there is no sale or docketing of the judgment therein.

ADVERSE POSSESSION—PAYMENT OF TAXES BY LEGAL OWNER—REPAYMENT BY OCCUPANT.—Where the taxes upon a lot were assessed to and paid by the legal owner of the lot, the lien thereof was gone, and any subsequent repayment of such taxes in any year by an occupant of the lot could not serve to ground or maintain an adverse possession by such occupant under section 325 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. D. J. Murphy, Judge.

The facts are stated in the opinion.

William H. Fifield, for Appellants.

Moses G. Cobb, for Respondent.

BELCHER, C.—This is an action of ejectment to recover possession of a lot of land situated at the southeast corner of Sacramento and Steiner streets, in the city of San Francisco. The complaint is in the usual form, alleging plaintiff's ownership of the lot in fee and her ouster therefrom by defendants. The an-

swer denies the allegations of the complaint and alleges that at all the times mentioned in the complaint the defendant, George W. Osborne, was, and still is, the owner in fee, in possession and entitled to the possession of the said lot, and further pleads in bar of the action the statute of limitations.

The case was tried by the court without a jury, and the findings upon all the issues raised by the pleadings were in favor of the plaintiff and against the defendants. Judgment was accordingly entered that plaintiff recover possession of the lot, with damages for its use and occupation, and costs of suit; and from that judgment defendants have appealed on the judgment-roll.

The findings are in substance as follows: P. H. Blake was the owner of the lot in controversy, and in April, 1870, conveyed the same to William B. Latham, Jr., by a deed absolute in form, but intended as a mortgage. The deed was dated April 5th, acknowledged April 6th, and duly recorded April 7, 1870. At the time the deed was given Latham executed to Blake a defeasance, which was acknowledged by Blake alone May 7, 1883, and on the same day recorded in a book of miscellaneous records in the office of the city and county recorder. At some time, when not stated, Latham commenced an action in the district court of the twenty-third judicial district to foreclose the mortgage created by said deed and defeasance, and on December 31, 1879, obtained a decree foreclosing Blake's right of redemption under said deed and defeasance, and ordering a sale of said lot of land, with other lots in foreclosure. Thereafter for a valuable consideration Latham executed to the plaintiff a deed of the said lot, which was dated February 14, 1880, acknowledged April 2, 1880, and duly recorded October 6, 1881. At the time of the delivery to and receipt of said deed by the plaintiff, she had no actual notice of the existence of said defeasance, or that the said deed from Blake to Latham was in fact a mortgage as between the parties thereto. On May 6, 1881, while the said decree of foreclosure remained unexecuted, one Page recovered against Latham in the superior court of San Francisco a money judgment for the sum of \$5,544.84, and \$195.25 costs of suit. On this judgment an execution was issued, and thereunder, on October 6, 1881, the lot in question was sold by the sheriff to the plaintiff herein for the sum of \$520, and on December 19, 1888, no redemption of said

lot from said sale having been made, the sheriff executed to the plaintiff a deed of "all the estate, right, title, and interest which William B. Latham, Jr., had on the sixth day of May, 1881, or at any time afterward" in said lot of land, which deed was acknowledged and afterward duly recorded. At this same execution sale other lands of Latham were sold, and the aggregate amount realized from the sale was \$5,200, which was applied in satisfaction of the said judgment, leaving a balance due thereon of \$219. On March 8, 1882, an *alias* execution was issued for the balance of \$219 due on the said judgment, and on the next day was levied upon the judgment and decree of foreclosure in the suit of *Latham v. Blake*. Thereafter, on the 15th of the same month, the said judgment and decree was sold by the sheriff, under said *alias* writ, to the defendant, G. W. Osborne for the sum of \$603.05, and on the next day a certificate of sale for the same was issued to him. On May 25, 1882, said Osborne, claiming to have succeeded to the interest of Latham in the said judgment and decree, procured an order of sale to be issued on the decree, and under it caused the sheriff, after the usual notice, to sell the lots mentioned in the decree, including the lot in controversy here, of which he became the purchaser. On December 28, 1882, no redemption having been made, the sheriff executed and delivered to Osborne a deed of all the right, title, and interest of the judgment debtor, Blake, in the said lot, and which he had therein on the 5th of April, 1870. Upon receipt of this deed Osborne entered into possession of the said lot, fenced the same, and by himself and tenants had held such possession ever since, claiming title to the lot under said deed. On October 13, 1884, Latham assigned his interest in the said judgment and decree of foreclosure to one Rowe, and thereupon Rowe applied to the court for an order requiring the clerk of the court to issue an order of sale upon the judgment and decree in his behalf as assignee, notwithstanding the order of sale issued thereon to Osborne, as before stated. The order so applied for was granted; and from that order Osborne appealed to the supreme court (*Latham v. Blake*, 77 Cal. 646), where it was adjudged and determined that the purchase by Osborne of said judgment and decree under the said execution sale, was of no effect, and such sale was ineffectual to transfer said judgment and decree to Osborne and

he took nothing thereby, wherefore the order appealed from was affirmed. This action was commenced in November, 1891, and during each of the five years next preceding its commencement all taxes levied upon the said lot were assessed to the plaintiff only, and were fully paid and discharged by her. Osborne also paid the said taxes, but, except in the years 1889 and 1890, he paid them after they had been paid by plaintiff.

Upon these facts the court found that at the time of the commencement of the action the plaintiff was, and still is, the owner in fee of the said lot, and entitled to the possession thereof, and her cause of action was not barred by the provisions of any of the sections of the Code of Civil Procedure pleaded in bar thereof.

On this appeal the only question to be decided is, Do the findings justify and support the judgment?

1. Section 2925 of the Civil Code provides: "The fact that a transfer was made subject to defeasance on a condition may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or incumbrancer for value and without notice), though the fact does not appear by the terms of the instrument."

And section 2950 of the same code provides: "When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the county recorder of the county where the property is situated."

Under these sections, if the plaintiff purchased the lot in controversy from Latham for value, and without notice that the deed to him was intended as a mortgage, she took a good title and became the real owner of the lot. See *Pico v. Gallardo*, 52 Cal. 206, where it was held that if land is conveyed by a deed absolute in form, as security for the payment of money loaned, a purchaser from the grantee, without notice that the grant was intended as a mortgage, acquires a title free from the equity of the grantor.

That plaintiff paid a valuable consideration for the lot, and that the defeasance was not then recorded is not denied. The court found that she had no "actual notice," but appellants contend that she must be deemed to have had constructive notice, because the decree of foreclosure was entered before her deed was executed.

No *lis pendens* was filed, and "the mere pendency of a suit does not, as at common law, charge the subsequent purchaser. A notice of *lis pendens* must appear of record." (*Warnock v. Harlow*, 96 Cal. 304; 31 Am. St. Rep. 209.) The code makes a docketed money judgment a lien upon all the real property of the judgment debtor not exempt from execution in the county (Code Civ. Proc., sec. 671), but in foreclosure cases the docketing of a deficiency judgment only creates a lien. (Code Civ. Proc., sec. 726.) Where the statute provides that the judgment shall create and establish a lien on the real property of the judgment debtor, there undoubtedly the judgment imparts notice of such lien; but we know of no statute which in effect declares that an unexecuted decree of foreclosure will operate to impart notice to those dealing with the plaintiff in the action as to the nature and extent of his interest in the land foreclosed upon. We conclude, therefore, that the plaintiff did not, when her deed was executed, have constructive notice that the deed to Latham, her grantor, was in fact only a mortgage. The cases cited by appellants, when properly considered, do not sustain their contention and need not be specially noticed.

2. Appellants further contend that prior to the commencement of this action defendant Osborne had acquired title to the said lot by adverse possession, and that the court erred in finding that the plaintiff's cause of action was not barred by the statute of limitations.

Since 1878 every claim of title to real property by adverse possession has been subject to the provision expressed in section 325 of the Code of Civil Procedure "that in no case shall adverse possession be considered established under the provision of any section or sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and

grantors, have paid all the taxes, state, county or municipal, which have been levied and assessed upon such land."

It appears that during the five years next preceding the commencement of the action the said lot was assessed to the plaintiff alone, and she paid in full all the taxes levied and assessed thereon. It is true Osborne also paid the taxes, but, except in two of the said years, he paid them after they had been paid by her.

In *Hayes v. County of Los Angeles*, 99 Cal. 74, it is said on page 78: "When the taxes upon property have for a given fiscal year been once paid by the owner, the county has no right or power to sell or in any manner affect or encumber the land by a sale thereof. The lien of the tax is gone." And in *Cavanaugh v. Jackson*, 99 Cal. 672, it is said by Mr. Justice Harrison, in his concurring opinion: "When the taxes upon a parcel of land have been once paid the burden is removed, and there no longer remains any tax to be paid. Such payment may be made by any person claiming an interest in the land, and the effect of such payment will be to discharge the land from the burden of the tax, and, as there is thereafter no obligation upon anyone to pay the tax, no right can be acquired by making a payment of the amount of the tax to the tax collector." And again: "If, when he [the adverse claimant] offers to make a payment to the tax collector, the tax which has been levied has been already paid, he cannot comply with one of the requirements of the statute and must fail to acquire a title by adverse possession."

In that case, it appeared that the land in controversy had been occupied by the adverse claimant for six years and assessed to him each of those years, and that all taxes levied thereon were paid by him. It was also assessed to the owner for three of the said years, and the taxes levied thereon were paid by said owner. But it did not appear which of the parties paid first. The court below gave judgment in favor of the adverse claimant, and on appeal the judgment was affirmed.

That case is clearly distinguishable from this, for here the lot in controversy was never assessed to Osborne and the tax collector had no right to accept the taxes from him after they had been fully paid by the plaintiff. As applied to the facts of this case, we think the language of Mr. Justice Harrison, above quoted, states the law correctly and should be followed.

If this be not so, then the owner of property might be deprived of it without any fault on his part and by the wrongful act of another. For example, suppose A were the owner of a lot of land, which he did not wish to improve or occupy, but was waiting till he could sell it for a better price. He had the property assessed to himself every year, and regularly paid all the taxes levied thereon. B, seeing the lot vacant, took possession of it, fenced it in, and used it for pasturing his cows or goats, without any objection on A's part, for the period of five years. The lot was never assessed to B, but each year, after the taxes thereon had been fully paid and discharged by A, he went to the tax collector and again offered to pay them, and that officer accepted such payments. Can it be true that, under such circumstances, B, when called upon to leave the lot, could successfully assert that he had paid all the taxes levied and assessed upon the lot for five years, and had acquired title thereto under the statute of limitations? We think not.

It must be held, therefore, that Osborne had not acquired title to the said lot by adverse possession.

3. It is objected that some of the findings are inconsistent with and contradictory of others, but we see no good ground for this complaint. The findings, when read together, seem fairly to cover the whole case and to justify and support the judgment.

The judgment should be affirmed.

Searls, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Harrison, J., Van Fleet, J.

Garoutte, J., concurred in the judgment.

Hearing in Bank denied.

[S. F. No. 717. Department Two.—November 3, 1897.]

E. R. THOMASON, Respondent, v. JOSEPH CUNEO et al.,
Appellants.

STREET ASSESSMENT—BOUNDARIES OF DISTRICT—DESCRIPTION IN RESOLUTION OF INTENTION—ANGLES AND DIRECTIONS CONTROLLED BY STREETS AND FIXED POINTS. — In determining the validity of a street assessment, the boundaries of the assessment district fixed by the resolution of intention will not be construed as not including a definite piece of land, merely because the calls for the angles and directions of the lines are at variance with the calls for streets and fixed points upon them, but the streets will be considered as monuments controlling the angles which they or their parallels are supposed to make with each other, and a fixed point on a street will control the direction of a line supposed to be parallel with another street, and it is sufficient if a surveyor, by rejecting the erroneous calls for angles and directions, can definitely locate the boundaries of the assessment district by means of the streets and fixed points upon them.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Troutt, Judge.

The facts are stated in the opinion of the court.

J. P. Langhorne, and James M. Allen, for Appellants.

J. C. Bates, for Respondent.

McFARLAND, J.—This is an appeal by defendants from a judgment of plaintiff in an action to foreclose the lien of a street assessment, in the city and county of San Francisco, and from an order denying defendants' motion for a new trial.

The only point made by appellants is, that the board of supervisors did not acquire jurisdiction to order the work done, because they failed to declare and describe in the resolution of intention any assessment district as required by section 3 of the street law—it being admitted that such declaration and description are jurisdictional. The contention of appellants is, that the calls of the description in the resolution of intention do not include any district or piece of land whatsoever—that they do not close at the initial point. It is clear that the diagram prepared by the official surveyor and attached to the assessment does show

the exterior boundaries of the alleged assessment district, and includes a definite piece of land; but it is contended that the surveyor could not properly produce the diagram from the description in the resolution of intention. We do not think, however, that this contention can be maintained.

In construing a description, monuments and fixed points control courses, distances, and angles. In the case at bar, there is no question as to the initial point; it is "a point on the east side of Kentucky street one hundred and five (105) feet northerly from the northeasterly corner of Kentucky street and Second avenue south." The first course is "thence running southeasterly and parallel with Second avenue south four hundred (400) feet," and there is no dispute as to this course. The second course is "thence at right angles southwesterly and parallel with Railroad avenue to the center line of Eighteenth avenue south." This line, if run at right angles with the first course, would not be parallel with Railroad avenue; if run parallel with said avenue it makes an angle with the first course somewhat greater than a right angle. But here the monument is the street—Railroad avenue; and the surveyor properly run the line southwesterly and parallel with the street, rejecting the term "at right angles" as controlled by the monument. The same thing was done with respect to the third course, which is "thence at right angles northwesterly and parallel with Eighteenth avenue south eight hundred and eighty (880) feet"; the line was run parallel with the avenue, although the angle thus made with the previous course was somewhat less than a right angle. The fourth course is: "thence at right angles northeasterly and parallel with Railroad avenue," to a definitely fixed point, to wit: "to a point four hundred (400) feet northwesterly from the westerly line of Kentucky street and one hundred and five (105) feet northeasterly from the northeasterly line of Second avenue south." This line, in order to reach the said fixed point, varies a very little from an exact parallel with Railroad avenue; but here the fixed point controls the other calls, and the surveyor properly ran from the end of the previous course in a direct line to the said fixed point. The fifth and last course is: "thence at right angles southeasterly and parallel with Second avenue south to the point of com-

mencement." A line from the said fixed point at the end of the fourth course to the point of commencement is very slightly out of parallel with Second avenue; but the same rule which we have applied to the fourth course applies here, and the surveyor properly ran the line straight from the one fixed point to the other.

The judgment and order appealed from are affirmed.

Henshaw, J., and Temple, J., concurred.

Hearing in Bank denied.

[S. F. No. 1032. In Bank.—November 5, 1897.]

In the Matter of the Estate of HIRAM A. PEARSONS, Deceased.

ESTATES OF DECEASED PERSONS—DECREE OF DISTRIBUTION NOT ENTERED IN MINUTE BOOK—PREMATURE APPEAL—DISMISSAL.—A decree of distribution of the estate of a deceased person is not entered, within the meaning of section 1715 of the Code of Civil Procedure, which provides that an appeal in probate proceedings "must be taken within sixty days after the order, decree, or judgment is entered," until it is "entered at length in the minute book of the court" as provided in section 1704 of the same code; and an appeal taken therefrom before such entry is premature, and vests the appellate court with no jurisdiction of the cause, and will be dismissed.

ID.—ENTRY IN CLERK'S REGISTER—MISLEADING OF APPELLANT—FAILURE TO MAKE INQUIRY.—An entry in the clerk's register of actions noting an entry of decree in the minutes, which had in truth no reference to its final entry at large in the minute-book, but only to an entry made by the courtroom clerk in his rough daily minutes of proceedings, of the fact that the decree had been made and filed, is not such an entry as could be conclusive in favor of the appellants that the decree had been finally entered, where it appears that they could have ascertained the true meaning of the entry by inquiry in the clerk's office, and although the appellants were misled by such entry in the register through failure to make inquiry, that fact cannot confer rights upon them which they otherwise have not.

ID.—ESTOPPEL OF RESPONDENTS — JURISDICTION. — No estoppel of respondents by their acts from pressing a motion to dismiss a premature appeal can avail the appellants, conceding that the facts show such estoppel, as the court has no jurisdiction to entertain such an appeal, and, upon the fact appearing, it will be dismissed of the court's own motion.

MOTION in the Supreme Court by Respondents to dismiss an appeal from a decree of distribution of the estate of a deceased person, rendered in the Superior Court of the City and County of San Francisco. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

C. F. Hanlon, for Appellant.

Joseph Hutchinson, George W. Haight, Joseph Naphtaly, and A. N. Drown, for the motion to dismiss, in behalf of the several Respondents represented by each.

VAN FLEET, J.—Motion to dismiss an appeal from a decree of final distribution, on the ground that it was prematurely taken.

Section 1704 of the Code of Civil Procedure requires that all orders and decrees in probate proceedings “must be entered at length in the minute book of the court”; and section 1715 of said code provides that an appeal “must be taken within sixty days *after* the order, decree, or judgment is entered.” A decree is entered within the meaning of the last section when it is “entered at length in the minute-book of the court,” as provided in section 1704; and an appeal taken before such entry is premature and vests this court with no jurisdiction of the cause, and will be dismissed. (*In re Rose*, 72 Cal. 577; *Home of Inebriates v. Kaplan*, 84 Cal. 486; *Menzies v. Watson*, 105 Cal. 109.)

The decree in this instance was signed by the judge November 24, 1896, and filed with the clerk on the following day, November 25th; but it was not entered in the minutes until December 14th following. The notice of appeal was served and filed November 30th, and the bond on appeal filed December 3, 1896. It thus appears that the appeal was perfected some eleven days prior to the entry of the decree, and was therefore premature.

Appellant's counsel contends, however, that he was misled into taking the appeal thus early by an entry found on the clerk's register, which tended to indicate, and which he interpreted to mean, that the decree had been entered on November 25, 1896; and he contends that inasmuch as the register is an official record which the clerk is required to keep, in which the successive steps in the proceeding are to be correctly noted, and as this

record is intended to inform appellant of the initial point of his right to appeal, it must be held to be conclusive of the facts it recites. But if such record would be held conclusive in any case where, as here, the actual entry of the decree is the fact which initiates the right (*Menzies v. Watson, supra*), before it could be so held it should appear that it was intended as a record of such fact. In this instance it appears without conflict that the entry in the register upon which appellants relied for their information had in truth no reference to the fact of the entering at length of the decree in the minute-book, and was not intended to record that fact; but that it referred to a wholly different step—an entry by the courtroom clerk, in his rough daily minutes of proceedings, of the fact that the decree had been made and filed on November 25th. It further appeared that the appellant could readily have ascertained the true signification of such entry by inquiry in the clerk's office. The fact, then, that appellants were misled by said entry, through their failure to make inquiry, cannot give them rights which they otherwise have not.

The objection that respondents are estopped by their acts from pressing this motion cannot avail appellants, even if it be conceded that the facts show such estoppel. Where the appeal is premature, equally with where it is too late, this court has no jurisdiction to entertain it, and, upon the fact appearing, it will be dismissed of the court's own motion.

The appeal is dismissed.

Harrison, J., McFarland, J., Temple, J., and Garrouette, J., concurred.

Rehearing denied.

[S. F. No. 598. Department One.—November 6, 1897.]

SANTA ROSA LIGHTING COMPANY, Appellant, v. E. F. WOODWARD et al., Respondents.

MUNICIPAL CORPORATIONS—LIGHTING STREETS — LETTING CONTRACT— DEMAND ON CITY COUNCIL.—The city council or boards of trustees of municipalities are charged with notice of the act of March 26, 1895, requiring the letting of contracts for lighting public streets, and it is not necessary for a party seeking to compel them to comply with the requirements of that act to embody in his formal demand all its provisions or to specifically point out the steps demanded to be taken. It is sufficient, so far as the demand is concerned, to make it upon the council.

ID.—DISCRETION AS TO LIGHTING STREETS—MANDAMUS TO COMPEL ADVERTISEMENT FOR BIDS.—The courts will not compel a city council to exercise its discretion as to whether the streets of its municipality should or should not be lighted; but where its past and present official conduct unmistakably show that it has determined that the city should be lighted by electricity, and there is no valid binding contract standing in the way of proceeding under the act of 1895, a writ of mandate will lie at the instance of a taxpayer to compel it to advertise for bids for such lighting, as required by that act, without any showing by him of actual pecuniary damage. It will be presumed that the disregard by the council of the requirements of the statute is injurious.

APPEAL from a judgment of the Superior Court of Sonoma County and from an order refusing a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion.

E. S. Pillsbury, and James W. Oates, for Appellant.

W. E. McConnell, and O. O. Webber, for Respondents.

CHIPMAN, C.—On November 19, 1895, the judge of the superior court of Sonoma county issued the alternative writ of the court directed to the defendants, the common council of the city of Santa Rosa, commanding them to advertise, as required by law, for bids for the lighting of the streets and public buildings and other public places of said city, and to show cause why a peremptory writ of mandate should not issue requiring them so to act.

A demurrer to the original petition was sustained and ten days

given to amend, and in the meantime the alternative writ was continued in force.

A verified amended petition was filed and a verified answer was filed. The cause was tried by the court, and judgment went for defendants dismissing the writ. Plaintiff appeals from the judgment and from the order denying its motion for a new trial.

It is sought to compel the defendants to advertise for sealed proposals for lighting the city and to let a contract under such advertisement. The action is brought under an act approved March 26, 1895 (Stats. 1895, p. 191), section 1. "The act provides that "before any city . . . shall enter into any contract for the lighting of its streets . . . the city council . . . shall advertise for bids for such lighting," etc. Section 2 provides that "all contracts . . . shall be let to the lowest bidder," the city reserving the right to reject all bids. Section 3 provides how the bids are to be submitted, and that when a bid is accepted the city shall enter into a contract embodying the specifications, etc., "but no contract shall be made for a longer period than one year . . . and shall go into effect within six months after the bid is approved." Respondents contend that, while injunction might lie if the council was lighting the streets since the act of 1895, without a contract, appellant has not shown any defined legal right in itself nor a corresponding duty devolved upon the council which they have refused to perform; that there must be a specific act specifically demanded of defendants, and that no such demand is alleged or proven. The sixth finding of fact is: "That plaintiff, since the third day of July, 1894, prior to commencing the suit, requested defendants to proceed and let a contract for lighting the streets of the city of Santa Rosa, but did not demand that said council proceed in any specified manner, and did not specify what acts defendants should perform in connection with the letting of said contract. That defendants did refuse to comply with plaintiff's said request, and have not since the third day of July made any contracts for lighting said streets." Finding XIV is: "That the plaintiff subsequently to July 31, 1894, and after the twenty-sixth day of March, 1895, demanded of said common council and of the members thereof that they have the lighting of the streets and other public places

of said city done by contract, and that they advertise for bids for such lighting."

The act of March 26, 1895, is a part of our statute law of which defendants had notice. It was not incumbent upon plaintiff to embody in a formal demand all the provisions of the act or to specifically point out the steps demanded to be taken. It was enough, so far as the demand was concerned, to make it upon the council, as the court found was done.

Upon the proposition that the courts have no power to compel a contract to be entered into, respondents cite *Splivalo v. Bryan*, 102 Cal. 403. In that case, it was found that the statute relied upon left the matter, whether a contract to sprinkle a public highway should be let after advertising for bids, to the discretion of the board of supervisors. It was not a discretion alone as to the expediency of doing the work, but whether it should be done by contract upon previous advertisement. Another case relied upon is that of *Boyce v. Ryan*, 100 Cal. 265, where it was sought to compel the district attorney of a county to institute a suit. *Fairchild v. Wall*, 93 Cal. 401, is also cited upon the proposition that the council had entered into a contract, and had refused to make another, and its act of refusal was final. If the contract of July 3d, upon which alone defendants rely, was a completed and valid contract, the case cited would have some application, but not otherwise, and, as no contract was completed at that time, it is not in point. It will not be and is not contended that the courts will compel a city council to exercise its discretion as to whether the streets should or should not be lighted. The council, having all the facts before it as to the financial ability of the corporation to incur the expense, and knowing the wish of the citizens and property holders, alone must decide. And this discretion is not so lodged with the council as that the courts can compel its exercise, as was said could be done in *Jacobs v. Board of Supervisors*, 100 Cal. 121, where the constitution devolved a duty and required its performance, to wit, the fixing of water rates annually. There it was held that the writ might be used to compel the exercise of discretion, but, when exercised, it could not be used to compel an abandonment of that judgment. Appellant concedes, for the purposes of this case, that the council cannot be compelled

to cause the streets to be lighted unless it has determined that the streets should be lighted; but it is contended that as soon as it has so determined the law steps in and prescribes the only mode by which it can be done, which is by contract let to the lowest bidder after bids have been advertised for and notice given as provided in the act of 1895.

The first question then is, Has the council determined that the street of Santa Rosa shall be lighted? This can be answered only by referring to the proceedings disclosed in the record. In 1891 the council made a contract with plaintiff to light the streets by thirty or more arc electric lamps for three years from August 1st of that year. On July 3, 1894, it resolved to enter into a contract for three years from August 1, 1894, with the Merchants' Lighting Company, to light the streets with arc electric lamps in such number as the council might determine, and the formal written contract provided for thirty-five or more. This contract not having been signed by the mayor or anyone for the city, the council made a temporary arrangement on July 31st with this company to furnish such lights as might be required. On November 17, 1894, it rescinded the action of July 3d. On May 14, 1895, a motion to shut off the street lights was defeated. The council ever since July 31, 1894, has been approving bills rendered for lighting the streets. The practical situation seems to be that there was no completed contract entered into on July 3d; that the contract of July 31st was temporary, and by the terms of the offer was to continue only during the pendency of the injunction suit, and is therefore terminated, and there is now no contract, but the council refuses to advertise for bids under the act of 1895, and the law is being evaded (whether purposely or not cannot be said) by simply assuming to pay for the service under the contract of July 3d.

The council when this action was brought was and presumably is now in effect making contracts from day to day to light the streets. The proceedings show with sufficient clearness that the council have determined that the city should be lighted by arc electric lamps, and there is no valid binding contract standing in the way of proceeding under the act of 1895 to let this service as therein provided. It would be an impeachment of

the intelligence and enterprise of the citizens of Santa Rosa to assume that they desired her streets to go unlighted. I think it sufficiently appears that the council has resolved to continue lighting the streets. The object and intention of the act of 1895 are too plain for doubt. It was designed to secure to the citizens and tax payers of cities and towns the advantage of open competition and to secure the service at the lowest price by letting contracts to the lowest responsible bidder. I do not believe that the law can be evaded by simply employing some person or corporation from day to day to perform the service. A construction of the law that would allow this to be done would nullify the object of its enactment.

Respondent contends that the only remedy is by injunction to stop an illegal payment of the warrants, but that no relief can be given by *mandamus*. It was held in *Eby v. School Trustees*, 87 Cal. 166, that the equitable remedy does not deprive a party of the legal remedy by *mandamus*. The court below found "that the burdens of taxation have not been increased by reason of any neglect of duty on the part of the council, . . . by reason of paying more for said lights than it otherwise would," and "that the plaintiff is not being damaged by the acts of defendants, and their taxes have not been increased by reason of any neglect of duty on the part of defendants." It was alleged by plaintiff and not denied that it was the owner of real estate situated in the city of Santa Rosa, subject to taxation by said city for city purposes, and was at all the times mentioned in the petition a taxpayer of said city. The plaintiff offered to furnish the lights required for one dollar less per light per month than was paid to the Merchants' Lighting Company, and there is no evidence that it was irresponsible or unable to perform the service; it had done so for three years, and there is no evidence that the service was unsatisfactory to the council. Besides, as a tax payer plaintiff was beneficially interested, and I do not think it essential, upon an application in a proper case designed to compel compliance with statute law, that the party must show actual pecuniary damage. It should be presumed that where the law enjoins a duty upon a municipal body, and specifically points out the mode of its performance, that a violation of that duty and a disregard of the mode of its performance will work injury.

In my opinion the findings designated as II and III stated above are not supported by the evidence. There are other findings more or less dependent upon these two which are also unsupported by the evidence.

It is recommended that the judgment be reversed and the motion for a new trial granted.

Belcher, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the motion for a new trial is granted.

Garoutte, J., Van Fleet, J., Harrison, J.

[S. F. No. 727. Department One.—November 9, 1897.]

ISAAC L. THURBER, Appellant, v. LOUISA MEVES et al.,
Respondents.

SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY.—While it is a general rule that mutuality of remedy is essential to authorize the specific performance of a contract, this rule does not require that such mutuality shall exist in all cases at the inception of the transaction.

ID.—CONTRACT FOR PERSONAL SERVICES.—A contract for the conveyance of land, in consideration of personal services to be performed by the vendee, may be specifically enforced at the instance of the latter, after such services have been fully or substantially performed.

ID.—CONTRACT FOR SALE AS SECURITY FOR LOAN—EQUITABLE MORTGAGE—TIME OF PAYMENT.—Where, after the making of a contract for the sale of land, in consideration of personal services to be performed by the vendee, the latter borrows a sum of money from the vendor, to be repaid at a particular date, and to secure the payment thereof agrees that the contract for sale should be held as security for the payment of the loan, and that the right to the conveyance should be dependent upon the payment thereof at the times and in the manner mentioned in the contract of loan, in addition to the other conditions precedent to the conveyance, such second agreement is in the nature of a mere equitable mortgage to secure the payment of the loan, and as its purpose could not be defeated by a mere failure to pay in accordance with its terms, a failure to pay on the day specified would not defeat the vendee's right to a specific performance of the contract for sale.

APPEAL from a judgment of the Superior Court of the County of Santa Cruz and from an order refusing a new trial.
J. H. Logan, Judge.

The facts are stated in the opinion of the court.

Julius Lee, for Appellant.

Spalsbury & Burke, for Respondents.

VAN FLEET, J.—January 1, 1883, plaintiff made a contract in writing with Otto Meves, under which Meves entered into the immediate possession of a tract of about forty acres of land belonging to plaintiff, the whole of which available for the purpose Meves was to clear up and cultivate to such fruit trees, grape vines and small fruit plants as should be furnished for the purpose by plaintiff—a certain acreage to be cleared and set out each year during the period of four years; and under which contract Meves was to erect certain fences and open up a certain private way or road; in consideration of which services plaintiff was to convey to Meves on January 1, 1888, the title to the north half of said premises.

On March 10, 1884, Meves borrowed of plaintiff one hundred and fifty dollars, for which he gave his promissory note payable two years from date, with interest at one per cent per month, payable quarterly, and to secure payment of which he gave plaintiff a writing which referred to the first mentioned contract, and provided that said contract should be held as security for payment of the note, and making the right to the conveyance therein provided for, “dependent upon the payment thereof at the times and in the manner mentioned in said promissory note, in addition to the other conditions precedent to said conveyance.”

August 14, 1889, Meves died, and March 10, 1890, plaintiff brought this action against these defendants, the heirs of Meves, to quiet title to the north half of the land described in said first-mentioned contract, then held and occupied by defendants, and to acquire possession thereof.

In a cross-complaint the defendants set up the contracts between their ancestor and plaintiff above referred to, alleged a compliance with the terms of the first, except to a partial extent wherein compliance was prevented by certain acts of plaintiff, a tender of payment of said note and willingness and readiness to pay any amount found due thereon, and prayed that plaintiff be

decreed to convey to them the portion of land stipulated in said contract. The court below found the facts in all material respects as alleged in the cross-complaint, except as to the alleged tender of payment of the note, and made a decree wherein plaintiff is required to convey the land to defendants upon payment by the latter, within sixty days, of the amount of said note and accrued interest.

Plaintiff appeals from the judgment and from an order denying a new trial.

1. It is first contended that inasmuch as the principal contract counted on by defendants was entered into by plaintiff solely in consideration of the personal services of Meves to be thereafter rendered, which services could not have been compelled by plaintiff, there was presented at the time the contract was entered into such a lack of mutuality as to take the contract out of the class which is susceptible of specific performance by either party. While it is a general and well-established rule that mutuality of remedy is essential to authorize the specific performance of a contract, this rule does not require that such mutuality shall exist in all cases at the inception of the transaction. Thus in the case of *Hall v. Center*, 40 Cal. 63, 67, speaking of this requirement, it is said by our predecessors: "The rule is one which is frequently adverted to, is well understood, and the reasons upon which it is rested are familiar. But the exceptions to its operation are numerous. Lord Redesdale, in *Lawrenson v. Butler*, 1 Shoales & L. 13, limits its application to a case 'where nothing has been done in pursuance of the agreement,' by which it is to be understood that though an agreement may, at the time it was entered into, lack the element of mutuality, and for that reason may not be then such an agreement as equity would enforce, yet if the party seeking relief has subsequently, with the knowledge and the express or tacit consent of the other, placed himself in such a position that it would be a fraud for that other to refuse to perform, equity will relieve."

The principles there announced are sustained in the later cases of *Ballard v. Carr*, 48 Cal. 74, and *Howard v. Throckmorton*, 48 Cal. 489. And, adverting to this element of mutuality and the question as to the time when it must exist, it is said by Mr. Waterman: "The rule as to the time is to be taken with this quali-

fication, that notwithstanding the contract when it is entered into be incapable of specific performance by one of the parties, or, being enforced against him, yet if the obligation to perform be mutual and the obstacle to performance be subsequently overcome, a decree may then be rendered. If the plaintiff has performed his part of the agreement, specific performance may be decreed, although the contract, so far as concerned performance by the plaintiff, was originally beyond the jurisdiction of the court": Waterman on Specific Performance, sec. 199. The authorities cited by appellant are not at variance with this qualification of the rule.

And while an obligation to perform personal services is one of which specific enforcement may not be had (Civ. Code, sec. 3390), this rule has not the effect to defeat the right to have the specific benefit of an enforceable obligation entered into in consideration of personal services, where such services have been fully or substantially performed. (*Ballard v. Carr, supra*; *Howard v. Throckmorton, supra*; *King v. Gildersleeve*, 79 Cal. 504, 510.) In *Howard v. Throckmorton, supra*, which, like *Ballard v. Carr, supra*, was an action to enforce an obligation to convey land in consideration of personal services as an attorney, it is said: "While it is true as a general proposition that a party who has contracted to perform services of the character mentioned in the contract in this case cannot maintain an action for specific performance while the contract remains unperformed on his part, yet, if he can show a substantial performance on his part, he is as fully entitled to maintain such action as he would be if the agreement on his part had been for the payment of money."

It is claimed that the court did not find that Meves had fully performed his part of the contract. But we think that the clear effect of the finding is, that the contract was in it substance and value, so far as affected plaintiff's rights thereunder, fully performed by Meves. The fact that a portion of the north half which was to go to Meves was not entirely cleared and planted, whether the failure as impliedly found by the court arose wholly through plaintiff's acts or not, did not materially affect any substantial right of plaintiff. It is found that the

latter's half was, so far as available for the purpose, fully cleared, cultivated, and set out.

2. It is contended, however, that by the terms of the second agreement made to secure the payment of the note the time of payment was made of the essence of the right to a conveyance; and that the note not having been paid, or payment tendered according to its terms, the right to such conveyance was thereby terminated, irrespective of defendant's rights under the first contract if standing alone. But we cannot ascribe such effect to that paper. This latter contract was entirely collateral to the first, and its relation thereto merely incidental—the essential purpose being to accomplish a wholly different object. It was in the nature of an equitable mortgage, the real purpose of which was to secure the payment of the note. Since this purpose could not be defeated by a mere failure to pay in accordance with its terms, time was not of the substance of the contract, and where, as here, the lapse is susceptible of exact compensation in money damages—in the way of interest—equity will not permit such default to defeat a right acquired under the first contract, to which the second is merely collateral. The rule in this respect is thus stated in *Fry on Specific Performance*, section 617: "Where that on the performance of which by the plaintiff the defendant relies is in its nature a collateral and separate contract, or is part of or referable to such a contract, though between the same parties, and entered into at the same time and having relation to the same subject matter as the contract which the party seeks to enforce, the court will not consider the default by the plaintiff in respect of the one contract as any bar to the specific performance to the other, though such default may give him a cross-right of action or suit."

3. The objection that findings 1 and 3 are contrary to the evidence is not tenable. Finding 1, if material, should not be considered as finding that plaintiff was not the holder of the legal title to the land; while finding 3 is in effect but a declaration that defendants are the owners of the equitable title.

4. We see nothing substantially wrong in the form of the judgment. It should, perhaps, not have declared the defendants named therein to be the owners in fee simple of the land, but should have declared their equity and directed the plaintiff,

upon payment of the amount due under the agreement within a specified time, to convey to them the legal title. But we are unable to see why the judgment as entered does not accomplish the same result. The plaintiff, however, was entitled, as conceded by defendants, to interest on the principal amount of the note from March 10, 1884, less the amount of interest paid, and the judgment as entered is erroneous in this respect. This was a mere clerical error, however, which could and should have been corrected in the court below on motion, and did not necessitate an appeal; and appellant is not therefore entitled to costs of the appeal.

The court below is directed to so modify its judgment as to correct this error, and as so modified the judgment will stand affirmed, with costs of the appeal to respondents.

Harrison, J., and Garoutte, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion on the 9th of December, 1897:

BEATTY, C. J.—On the doctrine of equitable conversion, and the theory that defendants are equitable owners of the fee in the land subject only to a lien for the money due plaintiff, I think it was error not to decree a foreclosure of the lien. The pleadings would have warranted such a decree and equity demanded it. As it is, plaintiff is turned over to another action for the relief he should have had in this action with costs.

For this reason I think the case should have been ordered to a rehearing.

[Sac. No. 90. Department Two.—November 9, 1897.]

In the Matter of the Estate of HENRY KLEMP, an Insolvent Debtor.

EXECUTION—EXEMPTION OF COMBINED HARVESTER.—Under section 690 of the Code of Civil Procedure a "combined harvester" is a farming utensil and an implement of husbandry, irrespective of its value, and if used chiefly for the farming purposes of a debtor, although occasionally used for others, is exempt from execution.

APPEAL from an order of the Superior Court of Sutter County refusing to set aside property to an insolvent debtor. E. A. Davis, Judge.

The facts are stated in the opinion of the court.

White, Hughes & Seymour, for Appellant.

K. S. Mahon, and Lawrence Schillig, for Respondent.

McFARLAND, J.—This is an appeal by an insolvent debtor from an order of the superior court denying his petition to have set apart to his use "one Holt Bros.' Combined Harvester." The Court adjudicated that said harvester, and certain other personal property not involved here, "are not utensils or implements of husbandry"; and in so holding we think the court erred.

The court found that at the date of the adjudication in insolvency, and for a long time prior thereto, the appellant had been engaged in the business of farming and grain raising, and during all that time had used and employed said harvester in the conduct of his business. The only evidence introduced on the subject of the harvester was the testimony of the appellant himself. He testified that for about nine years he had been engaged in farming and wheat raising on a certain piece of land in Sutter county; that he had cultivated between ten and eleven hundred acres; that he had used certain personal property, including said harvester, in said business; and that "all thereof were and are necessary implements for the proper conducting and care of my said business." He further testified as follows: "I purchased said harvester in the reaping season of 1888, and paid for the same about fifteen hundred dollars, but at this time it is worth about three hundred dollars. I purchased said harvester to be

used in harvesting my own crops grown on the leased lands above mentioned, but I have on some occasions, after having harvested my own crops, used said harvester in harvesting the crop or crops of one or two of my neighbors, usually in return for assistance rendered by such neighbor or neighbors in harvesting my own crops. I never have been in the business of harvesting grain, nor have I used said harvester in the business of harvesting grain for others in any manner other than above explained. A combined harvester is a necessary tool for a farmer and grain raiser who is engaged in the business to any considerable extent." He further said that "comparatively few farmers in Sutter county own a combined harvester; some of them still use headers, and some hire combined harvesters to harvest their crops." This testimony was in no way controverted.

Section 690 of the Code of Civil Procedure provides that "the farming utensils or implements of husbandry of the judgment debtor" are exempt from execution. This provision has, on its face, no limitation as to the character of the implements of husbandry so exempt; it does not even provide that they must be "necessary," as is provided in statutes of exemption in many other states, and as is provided in our own code as to other property exempted. Of course, personal property owned by a farmer which is really not an implement of husbandry is not exempt under the section; but if it be such an implement, its exemption does not depend upon its value. There is no limitation as to value, although there is such a limitation as to certain other kinds of property which are exempt under other provisions.

It is clear from the evidence that the combined harvester in question is a farming utensil and an implement of husbandry, if, indeed, that fact is not a matter of common knowledge. It was used directly and prominently in the business of farming, and for no other purpose; and it is not contended that appellant had other implements by which he could cut, thresh, or winnow his wheat. Horse rakes, gang plows, headers, threshing machines, and combined harvesters are as clearly implements of husbandry as are hand rakes, single plows, sickles, cradles, flails, or an old-fashioned machine for winnowing. There is no ground for excluding an implement from the operation of the statute because it is an improvement, and supplants a former implement

used with less effectiveness for the same purpose. Present methods of farming, as well as conducting other kinds of business, require the use of improved machinery.

The fact that not many farmers in Sutter county own combined harvesters is of no importance; it appears that it was not unusual for them to hire such harvesters. The amount of land cultivated by appellant is certainly not unusual in this state. The whole subject is one of legislative policy; and until the legislature shall see fit to limit the implements of husbandry which shall be exempt—either by enumeration, or by a restriction based on value—a court has no warrant in any of the reasons given by respondent to eliminate from the statute anything which is clearly within its terms. No decisions of this court cited by respondent are adverse to the above views. In the case of *In re Baldwin*, 71 Cal. 74, it was held that a threshing machine with an expensive outfit was not exempt because it was not used *chiefly* in doing work for others. The court there say: "It was not intended that all farming machinery which a farmer may own should be exempt because, while he uses it chiefly by renting it out, or in doing work on others' farms for hire, he still uses it to a small extent on his own land. To hold otherwise would enable the farmer who cultivates forty acres to invest a large amount of money in expensive implements, and to hold them free and clear of his creditors, though they were used but for a day on his own land, and for all the balance of the year were rented or hired to others." And in the later case of *In re McManus*, 87 Cal. 292, 22 Am. St. Rep. 250, this court say that in *In re Baldwin* it was held that the threshing machine was not exempt "upon the ground that the outfit was principally used in threshing grain raised by other persons for hire." (For a discussion of the general subject see *Montague v. Richardson*, 63 Am. Dec. 173, and notes—it being remembered that our code is broader than any to which our attention has been called, there being no such word used as "necessary," "proper," "adequate," etc.)

We think that the court below erred in refusing to set apart the combined harvester as exempt; and, therefore, the order appealed from is reversed.

Temple, J., and Henshaw, J., concurred.

[S. F. No. 660. Department Two.—November 10, 1897.]

S. M. BUCK, Appellant, v. CITY OF EUREKA, Respondent.

MUNICIPAL CORPORATIONS—FORM OF JUDGMENT.—A judgment against a municipality should be in form a general judgment, although it and the liability on which it is based can, under section 18 of article XI of the constitution, only be paid out of the municipal revenues of the fiscal year in which the liability was incurred.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order modifying such judgment. G. W. Hunter, Judge.

The facts are stated in the opinion of the court and in the opinion rendered on the former appeal reported in 109 Cal. 504.

F. A. Cutler, and George A. Knight, for Appellant.

A. J. Monroe, for Respondent.

TEMPLE, J.—This is an appeal by the plaintiff from the judgment and also from the order modifying such judgment. It is the second appeal in the case. (See *Buck v. City of Eureka*, 109 Cal. 504.) In pursuance of the permission given by this court in the judgment rendered in the former appeal, plaintiff filed his second amended complaint seeking compensation upon a *quantum meruit* for services rendered after his term of office had expired.

The defendant answered this amended complaint, and upon the trial plaintiff recovered a verdict for four thousand seven hundred dollars, for which amount judgment was entered. Soon after the entry of the judgment the court ordered it to be modified so as to express on its face that it was to be paid only out of the city revenues of certain years, then long past, and which revenues had presumably been entirely exhausted years before the judgment was rendered. This modification was made by the court upon the idea that it was required by section 18, article XI, of the constitution, which provides that "no city shall incur indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year," etc. It is also contended that the form of

the judgment is in accord with the decision of this court in *Weaver v. San Francisco*, 111 Cal. 327, and in *Smith v. Broderick*, 107 Cal. 644; 48 Am. St. Rep. 167.

The question as to the form of the judgment was recently before this court in *Higgins v. San Diego*, 118 Cal. 524. In that case, a majority of this court held that in such case the plaintiff was entitled—if he recovered—to an ordinary general judgment, which judgment could not, however, be paid out of the ordinary revenue of any year subsequent to the year in which the liability was incurred. According to that ruling, the qualification added to the judgment by the order appealed from must be stricken out.

It may be doubted, however, whether such a modification will be of any value to the appellant, and he submits and contends that this claim is one of those that may be lawfully paid from the ordinary revenues of a succeeding year. It is argued that the debt due plaintiff was necessarily contracted to meet an emergency which the municipal authorities could not have anticipated, and, therefore, could not have provided a revenue for; nor could they have taken the necessity for such expenditure into consideration when contracting liabilities chargeable upon the revenues of that year. The city was sued to recover damages for injuries caused by a mob. The demand exceeded the income of the city for the year. The authorities, it is said, must defend or allow the city to become bankrupt. It could not have been intended to deprive the city of the power to protect itself against ruin.

It may be denied that the case is as exigent as appellant contends, for the city has an attorney who is presumed to be competent to defend the city, but it cannot be denied that this is a liability incurred by the city. The language of Mr. Justice Miller in *Litchfield v. Ballou*, 114 U. S. 190, answers this suggestion very well. The constitution of Illinois prohibited an indebtedness exceeding five per centum of the value of taxable property. The court said: "It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds or notes, nor by express or implied contract. Nor shall it be done for any purpose. No matter how urgent, how useful, how unanimous the wish."

"If this prohibition is worth anything, it is as effectual as against the implied as the express promise, and is as binding in a court of chancery as a court of law."

If the constitutional restriction is plain, it is not for the court to refuse to obey it because it is unwise or impolitic. If the liability was contracted by the city it is within the inhibition.

I am not sure that this point can be reached in this case. According to the case of *Higgins v. San Diego*, *supra*, the judgment, whether the claim was one which could be paid out of the revenues of a succeeding year or not, would still be in form a general judgment. The view of the minority in that case was that liabilities incurred in violation of the inhibition were void, but if legally contracted could be paid out of any moneys in the treasury applicable to that class of liabilities without regard to the year's revenue to which such money belonged. If that view of the law had been adopted, the judgment would also have been in form a general judgment. If the judgment must be general, it is difficult to see how it can show whether it is payable only out of the revenues of the current year or not. At all events we must decline to hold that plaintiff's claim is not within the inhibition.

It is ordered that the modification of the judgment as first entered made by the superior court be vacated, and the judgment be allowed to stand as first entered.

Henshaw, J., concurred.

McFARLAND, J., concurring.—I concur in the judgment—that the judgment of the court below must be a general one as first entered. The court below naturally followed the decisions in *Weaver v. San Francisco*, 111 Cal. 327, and one or two other cases; but in *Higgins v. San Diego*, 118 Cal. 524, it was suggested that in the former cases the attention of the court was not called to the fact that an extraordinary revenue might be raised by a vote of the people, or in some other way, for the payment of an indebtedness accruing in a previous year, and that a judgment limiting its satisfaction solely to the revenues of a previous year might embarrass such action. Therefore it was held in the *Higgins* case that the judgment should be general in form. I see no difficulty in determining out of what revenues any particular

judgment should be paid; the judgment-roll shows the nature and the time of the accruing of the cause of action. "Merely putting a demand in the form of a general judgment would not in any way take it out of the general rule that the ordinary revenues of a future year cannot be applied to the payment of a liability in a previous year, as held in *Smith v. Broderick*, 107 Cal. 644; 48 Am. St. Rep. 167." (*Higgins v. San Diego, supra.*)

[L. A. No. 348. Department Two.—November 10, 1897.]

JOSEPH MULLALLY, Appellant, v. F. M. TOWNSEND et al., Respondents.

ATTACHMENT—BOND FOR RELEASE—TWO DEMANDS REQUIRED TO CHARGE SURETIES—JOINT AND SEVERAL LIABILITY.—Under a bond given for the release of attached property, conditioned that if plaintiff recover judgment, defendant will, on demand, redeliver the attached property to the proper officer, to be applied on the payment of such judgment, or, in default thereof, the defendant and sureties will, on demand, pay to plaintiff the full value of the property released, not exceeding the amount of the bond, the liability of the sureties does not arise until a demand and refusal of the defendant to redeliver the attached property, and, when such demand and refusal has been made, a further demand upon the obligors of the bond for the payment of the value of the property is essential to a right of action upon the bond; but where the liability of the principal and sureties is by the terms of the bond joint and several, and only the sureties are sued without joining the principal, it is sufficient to make demand for the payment of the value of the property upon the sureties alone.

ID.—DEMAND FOR REDELIVERY—CHATTEL MORTGAGE—REFUSAL.—Where, subsequently to the release of the property attached, it has been subjected by the defendant to a chattel mortgage executed to a third party, the plaintiff, upon the issuance of execution with instructions to levy upon the property attached, is not bound to accept the property burdened with such chattel mortgage, and the refusal of the defendant and the chattel mortgagee to deliver the property to the sheriff, upon his demand therefor, otherwise than upon the payment of such chattel mortgage, is a refusal to redeliver the attached property to the sheriff.

ID.—JUDGMENT LESS THAN VALUE OF PROPERTY—DEMAND UPON SURETIES FOR PAYMENT—MEASURE OF OBLIGATION.—If the judgment recovered by the plaintiff is less than the value of the property attached as fixed in the bond for release, and less than its admitted value at the time of the release, the payment of the amount of the judgment, is the full measure of the obligation of the sureties upon

such bond, and a demand upon them "that they pay to the plaintiff the said judgment" is a specific and sufficient demand to charge the sureties, where there has been a refusal of the defendant to redeliver the property.

ID.—GENERAL DEMAND FOR FULFILLMENT OF OBLIGATION.—A general demand upon the sureties on the bond for release that they fulfill their obligation, as expressed in their undertaking, is sufficient, if standing alone, to charge them with their obligation to satisfy the judgment against the defendant, when it is less than the admitted value of the property at the time of the release, and is not inconsistent with a specific demand that they should pay the said judgment, but requires the same thing in different language.

ID.—OBJECT AND SUFFICIENCY OF DEMAND.—The legitimate object of a demand is to enable a party to perform his contract, or discharge his liability, according to the nature of it, without a suit at law; and there is no stereotyped form or manner of demand, but any language intended to constitute a demand, and which plainly informs the party of whom the demand is made that he is required to perform the duty or obligation to which the demand refers, is sufficient.

ID.—PLEADING OF DEMAND—CERTAINTY—GENERAL DEMURRER—MOTION FOR NONSUIT.—Where an obligation itself provides that a demand shall be made, it must be made and alleged, and should be pleaded with directness and certainty; but an objection to the sufficiency of an allegation of demand for want of certainty must be by special demurrer pointing out the particular defects complained of, and cannot be urged upon general demurrer to the complaint, nor upon a general objection raised to its sufficiency to state a cause of action, upon a motion for nonsuit which admitted all of its allegations to be sustained by sufficient evidence.

ID.—ANSWER—INSUFFICIENT DENIALS OF ATTACHMENT—PROCEEDINGS FOR WANT OF KNOWLEDGE OR INFORMATION.—Denials in the answer of the sureties, made to allegations in the complaint in reference to the commencement of the action and the attachment of the property, for the release of which their bond was admitted to have been given, made for want of knowledge or information sufficient to form a belief of the allegations denied, the truth of which was readily ascertainable from the public records, and was indicated by the affirmative allegations of the answer to be within the knowledge or information of the defendants, are insufficient to raise an issue, and may be properly stricken out or disregarded by the court.

APPEAL from a judgment of the Superior Court of Los Angeles County. Waldo M. York, Judge.

The facts are stated in the opinion.

Henning & Bowen, and King & Harmon, and C. C. Wright, for Appellant.

Jones & Weller, for Respondents.

HAYNES, C.—Plaintiff brought an action in superior court against one Thomas J. Kelly to recover the sum of one thousand dollars, and procured a writ of attachment to issue and to be levied on property of the said Kelly, consisting of furniture, carpets, and household goods in a certain hotel kept by Kelly. Thereupon Kelly executed to the plaintiff a bond in the sum of \$1,500 for the release of said property from the attachment, pursuant to the provisions of sections 554 and 555, of the Code of Civil Procedure, upon which bond Townsend and Ward, the defendants in this action, became his sureties, and the attached property was thereupon released. The obligatory part of said bond is as follows:

“Now, therefore, we, the undersigned, residents and freeholders of the state of California, in consideration of the premises and in consideration of the release from attachment of all property attached, as above mentioned, and the discharge of said attachment, do jointly and severally undertake in the sum of \$1,500, and promise that in case said plaintiff recover judgment in said action the said defendant will, on demand, redeliver said attached property, so released, to the proper officer, to be applied on the payment of such judgment; or, in default thereof, the said defendant and sureties will on demand pay the said plaintiff the full value of the property released, not exceeding the sum of \$1,500.”

Thereafter the plaintiff recovered judgment in said action against said Kelly for the sum of \$785.51, including costs, and an execution issued thereon was placed in the hands of the sheriff for execution, with instructions to levy upon said property which had been so attached and released; but the officer was informed by Kelly and one Hunter that after said release Kelly had executed to said Hunter a chattel mortgage upon the whole of said released property to secure the sum of \$500, which mortgage had been duly recorded, and said Kelly and Hunter refused to surrender said property otherwise than upon payment of said \$500 to said Hunter. At the time said property was attached it was of the value of \$2,000, but was encumbered by liens and contracts to secure other indebtedness of said Kelly to the amount of \$800. Plaintiff refused to pay the Hunter mortgage, but offered to pay the liens existing prior to the attachment,

and the sheriff returned the writ wholly unsatisfied, Kelly being insolvent and having no other property.

The plaintiff thereupon brought this action against Kelly's sureties on the redelivery bond, and the foregoing are, in substance, the facts stated in the complaint, except as to the demand made upon the defendants, which will be noticed hereafter.

The defendants filed a general demurrer to the complaint, and it was overruled by the court. They then answered, but the substance of the answer need not now be stated.

When the cause was reached for trial plaintiff moved for judgment on the pleadings, and his motion was denied. Counsel for defendants then admitted that plaintiff could prove all the allegations of his complaint, and waived the introduction of evidence in support of any of its allegations, and moved for a nonsuit upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and that all the evidence admitted would not establish plaintiff's right to recover.

This motion was granted, and judgment of dismissal was thereupon entered, and this appeal is from said judgment upon the judgment-roll, which contains appellant's bill of exceptions.

Respondents have not seen proper to file any brief, and we are therefore obliged to consider the case without the benefit of their statement of the particular defects of the complaint upon which they based their motion for a nonsuit.

In appellant's opening brief it is said that defendants' objection to the complaint in the court below was that the demand alleged in paragraph IX of the complaint is insufficient. As there is no reply to this statement we assume that to be the only point of objection.

That paragraph is as follows: "That prior to the commencement of this action plaintiff demanded of defendants herein and each of them, who are sureties on said undertaking, that they pay the plaintiff the said judgment, and demanded of them the fulfillment of the obligation as expressed in said undertaking, but defendants, and each of them, having wholly failed, neglected, and refused to pay said judgment, or any part thereof, or in any manner at all to keep, fulfill, or comply with the conditions or obligations on their part of said undertaking."

The prayer is for judgment for the value of said property to the extent of the said judgment for \$785.50 and interest thereon and costs.

The terms of the bond required Kelly to redeliver the attached property to the sheriff upon demand. As to this demand there seems to be no question. It was not only alleged that in fraud of plaintiff's rights he had mortgaged the property to Hunter, but it is also alleged that an execution upon the judgment was placed in the hands of the sheriff, with instructions to levy upon said property, and that Kelly and Hunter refused to deliver it to the sheriff otherwise than upon the payment of the \$500 to Hunter. This was a refusal to deliver the property. The plaintiff was not bound to accept part of the property or to accept it all burdened with a lien placed upon it after the execution of the bond and the release of the attached property thereunder. (*Metrovich v. Jovovich*, 58 Cal. 341.)

Until this demand and refusal the liability of the defendants as sureties could not arise; but such demand upon the refusal by Kelly having been made, a further demand for the payment of the value of the property was essential to a right of action upon the bond. This liability was by the terms of the bond joint and several, and it was sufficient to make such demand upon the sureties alone, Kelly, the principal, not having been sued.

The legitimate object of a demand is to enable a party to perform his contract or discharge his liability, according to the nature of it, without a suit at law. (*Ayer v. Ayer*, 16 Pick 327.) In Missouri by statute (Rev. Stats. 1879, sec. 1018) a party is not permitted to object for want of a demand upon him, unless he sets up the want of it, accompanied by a tender of the property or money admitted to be due, and this goes only to the question of costs. Our statute, however, under which the bond in question was given, requires a demand (Code Civ. Proc., sec. 555), and in general, where the obligation itself provides that a demand shall be made, it must be made and alleged; but there is no stereotyped form or manner of demand. Any language intended to constitute a demand and which plainly informs the party of whom the demand is made that he is required to perform the duty or obligation to which the demand refers, is sufficient. A demand, however, like all allegations of fact, should

be pleaded with directness and certainty. But whether any given essential allegation should be held sufficient on appeal often depends upon the manner in which it is attacked. Objections which go to the sufficiency of the statement of facts, and not to the facts themselves, must be by special demurrer pointing out the particular defects complained of. (*Himmelman v. Spanagel*, 39 Cal. 401; *Tehama County v. Bryan*, 68 Cal. 57; *Harnish v. Bramer*, 71 Cal. 158; *Grant v. Sheerin*, 84 Cal. 200; *Amestoy v. Electric etc. Co.*, 95 Cal. 314.)

The defendants interposed a general demurrer to said complaint, and that demurrer was overruled. The admission of defendants, when the cause was called for trial, that the plaintiff could prove all the facts alleged in the complaint, and their waiver of the production of any evidence on the part of the plaintiff, thus treating all its allegations as sustained by sufficient evidence, and then moving for a nonsuit, presented no question that was not presented by the demurrer, and the correctness of the ruling of the court upon the motion for a nonsuit involves, like the general demurrer, the sufficiency of the complaint.

The demand made upon the defendants, and each of them, is alleged to have been "that they pay the plaintiff the said judgment, and demanded of them the fulfillment of the obligation as expressed in said undertaking."

The judgment recovered by plaintiff against Kelly was less than the value of the property as fixed in the bond, viz., the sum of \$1,500, and less than the sum alleged in the complaint, and admitted by defendants' motion to have been its value at the time of the release, viz., \$1,200; and in such case the collection upon execution of the amount due upon the judgment against Kelly, and the cost of the action against these defendants, would satisfy the judgment. That being true, if the defendants had complied with the first part of the alleged demand by paying the amount of the judgment against Kelly, the full measure of the defendants' obligation would have been satisfied, and that was all the plaintiff was entitled to. That part of the demand was specific and sufficient.

The remainder of the demand, viz., that they fulfill their obligation as expressed in their said undertaking, was less specific,

but was, nevertheless, if it had stood alone, quite sufficient. It demanded that they do all that their undertaking required them to do, and that was that they satisfy the judgment against Kelly. The demands were apparently inconsistent, but were not so in fact. They required the same thing. That which would have satisfied the one would have satisfied the other, and certainly a repetition of the demand, which required the same act, though couched in different language, could not affect its validity, either as a matter of pleading or of proof. We conclude, therefore, that the court erred in granting the nonsuit.

Before said motion for a nonsuit was made, the plaintiff moved for judgment on the pleadings, upon the ground that no material issue was raised by the answer. This motion was denied and plaintiff excepted.

The answer is indefinite and uncertain in its affirmative allegations, and must have been held bad, as to those allegations, upon special demurrer; while the only denial which is well pleaded is that which denies plaintiff's averment that he offered to accept the property and pay all the liens and encumbrances which existed thereon at the time it was attached.

As to the affirmative allegations, the third paragraph does not show why the property was released by the sheriff; though, taken in connection with the averments of the complaint and the allegations in the fourth paragraph of the answer, it is probable that the release was because of the Hunter mortgage.

The fourth paragraph alleges the release and satisfaction of the Hunter mortgage, but does not show that such release and satisfaction was before the commencement of this action; and the same uncertainty exists as to the sixth paragraph.

All the denials, except the one above mentioned, are made upon the ground that defendants have "no knowledge or information sufficient to form a belief as to the allegations contained" in the first, fourth, fifth, and sixth paragraphs of the complaint. Said first paragraph alleges the commencement of the action against Kelly and the attachment of said property.

Not only were the records of the court showing these proceedings readily accessible to the defendants, but the second paragraph of the complaint, setting out the redelivery bond executed by the defendants, and the release of said property there-

under, was not denied. And so of the denials of the other paragraphs above mentioned. The truth of those allegations was readily ascertainable from public records, and the affirmative allegations of the answer showed that defendants had knowledge or information concerning them.

Such denials are not permissible. (*Mulcahy v. Buckley*, 100 Cal. 484.) They might properly be stricken out on motion or disregarded by the court. They did not raise an issue as to the matters thus attempted to be denied.

For the purposes of this case we think some of the affirmative defenses should be regarded as the defective statement of material matters, and, as the judgment of nonsuit must be reversed, that defendants should have the opportunity to amend their answer, so that the case may be fairly tried upon its merits.

We therefore advise that the judgment appealed from be reversed, and a new trial ordered, with leave to the parties respectively to amend their pleadings as they may be advised.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed, and a new trial ordered, with leave to the parties respectively to amend their pleadings as they may be advised.

McFarland, J., Temple, J., Henshaw, J.

[Crim. No. 358. In Bank.—November 11, 1897.]

THE PEOPLE, Respondent, v. W. H. T. DURRANT, Defendant.

CRIMINAL LAW—SENTENCE OF DEATH—ERRONEOUS ORDER FIXING DAY FOR EXECUTION—STAY OF PROCEEDINGS — HABEAS CORPUS — PENDENCY OF APPEAL FROM FEDERAL COURT—PRESUMPTION — ABSENCE OF PROOF OF FINAL DECISION.—An appeal to the supreme court of the United States from an order of the circuit court refusing an application for a writ of *habeas corpus* by a prisoner under sentence of death for murder, stays the hands of the state and of the state authorities during its pendency; and it being established from the records of the circuit court that such an appeal was taken, and is pending so far as disclosed by those records, it will be presumed to be still pending, until the presumption is overcome by le-

gal proof, and, where there was no legal evidence of a final decision of such appeal before the superior court, its order fixing a day for execution of the prisoner is erroneous and reversible upon appeal.

ID.—APPEALABLE ORDER—INSUFFICIENT TIME ALLOWED FOR BILL OF EXCEPTIONS—ABUSE OF DISCRETION.—An order fixing a day for execution of a prisoner under previous sentence of death is appealable; and where such order so limits the time appointed for the death as not to allow the defendant the time guaranteed by law in which to prepare and present his bill of exceptions, it is in violation of his rights, and is a gross abuse of discretion.

APPLICATION in the Supreme Court for a certificate of probable cause to stay proceedings under an order of the Superior Court of the City and County of San Francisco fixing a day for the execution of a sentence of death. George H. Bahrs, Judge.

The facts are stated in the opinion of the court.

E. N. Deuprey, J. H. Dickinson, and Louis P. Boardman, for Appellant.

W. F. Fitzgerald, Attorney General, for Respondent.

HENSHAW, J.—This is an application for a certificate of probable cause to stay proceedings under an order of the superior court fixing a day for the execution of the judgment of death heretofore pronounced against appellant.

It is made to appear from the papers on file on this appeal, and presented to us in support of this application, that appellant having been brought before the superior court upon November 10, 1897, it was by that tribunal ordered that sentence of death be executed upon him two days thereafter, to wit, upon Friday, November 12, 1897.

In answer to the statutory demand made upon him to show legal cause why the order should not be made, appellant, by his counsel, offered evidence showing that he had appealed to the supreme court of the United States from an order of the circuit court of the ninth judicial circuit refusing his application for a writ of *habeas corpus*, and introduced in evidence the records of the circuit court tending to show that this appeal was still pending and undecided. Such an appeal, while pending, stays the hands of the state and of the state authorities. (U. S. Rev. Stats., secs. 763-66; *In re Juiro*, 140 U. S. 291.)

Against the evidence thus offered no counter-showing whatever was made. It thus having been established that the appeal is pending, it will be presumed to be still pending until the presumption is legally overcome. (Code Civ. Proc., sec. 1963, subd. 32.) Therefore, so far as the record now before us discloses, the defendant was subjected to proceedings in a matter involving a federal question which was *sub judice* before the supreme court of the United States. Such proceedings are null and void. (U. S. Rev. Stats., sec. 766.)

The question here presented differs from that considered in the Jugiro case, *supra*. In the latter case Jugiro's appeal from an order of the circuit court denying his application for a writ of *habeas corpus* had been decided adversely to him upon November 24, 1890. Upon December 1, 1890, the mandate of the supreme court not having been issued, he was brought before the court of oyer and terminer in New York, and there by order a day was fixed for his execution. Upon a second appeal under *habeas corpus* proceedings, the contention was made before the supreme court of the United States that this order of the court of oyer and terminer was absolutely void. The supreme court of the United States, stating that it took judicial knowledge of its own decisions, and that therefore itself knew that the former decision had become final, declared that, while "it would have been more appropriate and orderly if the state court had deferred final action until our mandate was issued and filed," it did not "feel authorized to say that the order of the New York court was absolutely void."

In the present case the question is not, What judicial knowledge has the supreme court of the United States of its own decisions? but it is, What legal evidence was adduced before the judge of the superior court to justify him in pronouncing the order in question after a showing by appellant that his appeal staying the hands of the state authorities was still pending? If he had no evidence warranting his act (and none appears in the record presented), then the order is certainly erroneous, and as such reversible upon this appeal; while in the Jugiro case mere matters of error could not be and were not considered.

There is yet another and independent consideration calling for the issuance of the certificate. The order here under con-

sideration is an order made after final judgment. From such an order an appeal to this court lies. (Pen. Code, sec. 1237.) From the date of the making of the order the appellant is guaranteed by the law ten days in which to prepare and present his bill of exceptions. (Pen. Code, sec. 1174.) It is not for one moment to be contemplated that this right, so secured to a defendant, may be cut down and destroyed by an order of court fixing the date of execution of a defendant within this period. Under the law of this state it is a violation of a defendant's rights and a gross abuse of discretion so to shorten the time.

For these reasons a certificate of probable cause will issue.

Temple, J., Van Fleet, J., Harrison, J., Beatty, C. J., and McFarland, J., concurred.

GAROUTTE, J., dissenting.—Upon the authority of *In re Jugi*, 140 U. S. 291, I dissent from the order granting the certificate of probable cause.

[Crim. No. 362. In Bank.—November 11, 1897.]

Ex Parte J. H. TODD on Habeas Corpus.

DIVORCE—ALIMONY—INABILITY OF DEFENDANT—NEGLECT TO SEEK EMPLOYMENT UNDER ORDER OF COURT—CONTEMPT—JURISDICTION—HABEAS CORPUS.—The court in which a decree of divorce is entered, including an order that the defendant shall pay permanent alimony to the plaintiff in specified installments, has no jurisdiction to compel the defendant, where he has no money or other means of payment, and has made no fraudulent disposition of property, to seek employment in order to earn money to pay the alimony decreed, nor to punish him for contempt for failing to do so; and where he is imprisoned for such alleged contempt, he will be discharged upon *habeas corpus*.

HABEAS CORPUS in the Supreme Court to the Sheriff of Sacramento County, to test the validity of an order of the Superior Court of Sacramento County imprisoning the petitioner for contempt of court. E. C. Hart, Judge.

The facts are stated in the opinion of the court.

T. J. Clunie, and E. A. Bridgford, for Petitioner.

THE COURT.—Petitioner's wife obtained a decree of divorce, including an order for the payment of permanent alimony in weekly installments. After paying two hundred and eighty dollars, the petitioner ceased making further payments, and, at the instance of the plaintiff in the divorce suit, was cited by the superior court to show cause why he should not be punished for contempt of the order of the court in failing to pay the sum of two hundred dollars in arrears, and also to show cause why he should not pay to plaintiff said sum of two hundred dollars.

Petitioner appeared in response to the citation, and, after hearing testimony pro and con, the court found, among other facts, that he had no money or other means of payment, and that he had made no disposition of any property in fraud of his creditors.

The court found, in other words, that it was not in the power of the petitioner to pay the money, or any part of it. But, at the same time, the court found that petitioner, having been allowed a month or thereabouts to seek employment by which he might have earned money to make the weekly payments of alimony as prescribed in the order, had wholly failed and neglected to make any effort to obtain employment, and, therefore, ordered him to be imprisoned in the county jail until he paid the two hundred dollars due.

This order was clearly in excess of the power of the court, which cannot compel a man to seek employment in order to earn money to pay alimony, and punish him for his failure so to do.

Prisoner discharged.

BEATTY, C. J., concurring.—I concur in the above, but, even conceding that the failure of the petitioner to seek employment was a contempt, the order could not be sustained under section 1218 of the Code of Civil Procedure, because a criminal contempt is punishable by imprisonment not exceeding five days, whereas the imprisonment prescribed by this order is not so limited, but would, upon the facts found, be perpetual unless some charitably disposed person should donate to petitioner the means of payment.

Nor can the order be sustained under section 1219 of the Code of Civil Procedure, because it is only when the contempt consists in the omission to perform an act which is in the power of the

person to perform that he may be imprisoned until he shall have performed it; and here the express finding of the court is that the petitioner cannot pay.

[L. A. No. 229. Department One.—November 12, 1897.]

H. J. FINGER, Plaintiff; ALEXANDER LYALL, Petitioner and Respondent, v. SUSAN McCAUGHEY, Administratrix, etc., Appellant.

FORECLOSURE OF MORTGAGE—ESTATE OF DECEASED PERSON—PARTIES—ADMINISTRATRIX—HEIRS—WRIT OF ASSISTANCE TO PURCHASER.—In an action to foreclose a mortgage executed by a deceased person, it is sufficient to make the administratrix of his estate a party defendant, and the heirs of the mortgagor are not necessary parties to the action, nor is it necessary that the administratrix should be sued individually in order to bar her right of succession to the mortgaged premises; and the purchaser at the foreclosure sale, after receiving his deed, is entitled to a writ of assistance against the administratrix for possession of the premises, where her answer to the application for the writ fails to show that she claims the property or the possession thereof by any right or title adverse to that of her deceased husband, whose right was foreclosed in the action to which she as administratrix was a party.

APPEAL from an order of the Superior Court of Santa Barbara County granting a writ of assistance. W. B. Cope, Judge.

The facts are stated in the opinion.

Thomas McNulta, and W. S. Day, for Appellant.

B. F. Thomas, for Respondent.

SEARLS, C.—This is an appeal from an order of the superior court in and for the county of Santa Barbara, granting a writ of assistance in favor of Alex. Lyall and against the appellant.

The facts disclosed by the record show that on the sixth day of June, 1890, George McCaughey, defendant's intestate, executed to H. J. Finger a mortgage upon the land described therein, to secure the payment of his promissory note for five hundred dollars and interest. McCaughey died, and Susan McCaughey-

ey, his widow, was appointed, and is still, the administratrix of his estate.

The claim of Finger was presented to the administratrix and allowed by her, and the allowance approved by the judge of the superior court.

Finger brought suit to foreclose his mortgage, making the administratrix a party defendant. A notice of *lis pendens* was filed, etc. Defendant was duly served with summons and made default.

A decree in foreclosure in the usual form was entered, under which a sale was had and Alexander Lyall became the purchaser. No redemption having been made, Lyall in due time received a sheriff's deed, which he presented to appellant and demanded possession as in the decree provided for, and, upon her refusal to yield such possession, filed his petition for a writ of assistance.

Appellant in her answer avers that she was before the institution of the action in foreclosure, and still is, "in possession of the premises, the subject of said suit, under claim of right of possession and of title, and that she was never made a party to said suit and never appeared, and her right to possession has not been and was not litigated in said action. She therefore avers that she is not subject to the terms and provisions of said judgment, and, as she is advised and believes, is not subject to summary removal from said premises upon any process issued upon such judgment."

The answer of Susan McCaughey does not deny that she is the widow of the mortgagor and the administratrix of his estate. As such administratrix she is entitled to possession of his estate, and her claim of possession and a right of possession will, in the absence of a showing to the contrary, which does not here exist, be attributed to her right as an administratrix.

If the mortgaged premises consist of community property, appellant may be entitled by right of succession to an undivided one-half thereof. Still, if this is so, it was not necessary to make her individually a party defendant in order to bar her right. Heirs of a mortgagor are not necessary parties defendant in an action to foreclose. (*Bayly v. Muehe*, 65 Cal. 345; *Monterey County v. Cushing*, 83 Cal. 507; *Cunningham v. Ash-*

ley, 45 Cal. 485; *De Halpin v. Oxarart*, 58 Cal. 101; *Spotts v. Hanley*, 85 Cal. 167; *Collins v. Scott*, 100 Cal. 452.)

It is sufficient to say that the answer of appellant fails to show that she claims the property or the possession thereof by any right or title independent of or adverse to that of her deceased husband, whose right was foreclosed in the action to which she as administratrix was a party.

We recommend that the order appealed from be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

Garoutte, J., Van Fleet, J., Harrison, J.

[L. A. No. 234. Department One.—November 12, 1897.]

COUNTY BANK OF SAN LUIS OBISPO, Appellant, v. W. H. FOX et al., Defendants. STELLA PAYNE MEADS, Respondent.

MORTGAGES—CONFLICT AND PRIORITY—PRIOR RECORDATION OF SECOND MORTGAGE—ACTUAL NOTICE—UNPROTECTED TRANSFER.—The prior recordation of a second mortgage does not give it priority over a first mortgage which is subsequently recorded, where the mortgagee named in the second mortgage had actual notice of the execution and existence of the prior note and mortgage when the second mortgage was executed, while such mortgage remains in the hands of the mortgagee, or of his assignee, who takes without consideration, or subsequently to the record of the first mortgage.

ID.—FORECLOSURE—CONFLICTING MORTGAGES—PLEADING — PROTECTION OF BONA FIDE ASSIGNEE OF SECOND MORTGAGE.—In a foreclosure suit, where there is a conflict as to priority of lien between an assignee of such second mortgage and the prior mortgagee, and it appears that the subsequent mortgagee, whose mortgage was first recorded, had actual notice of the prior mortgage, it devolves upon such assignee, in order to claim protection as a *bona fide* purchaser of the second mortgage for value, without notice of the prior mortgage, to plead and prove the facts essential to make him such *bona fide* purchaser, and to show that he took for value prior to the recordation of the first mortgage, and without actual notice thereof.

ID.—CONSTRUCTIVE NOTICE TO ASSIGNEE.—Where the court finds that the second mortgagee had actual notice of the prior mortgage, and there is neither allegation nor finding that any consideration was

paid for the assignment of the second mortgage, and it does not appear but that it may have been made after recordation of the first mortgage, the assignee of the second mortgage will be deemed chargeable with constructive notice of the prior mortgage, and a decree giving priority of lien to the first mortgage will be affirmed.

APPEAL from a judgment of the Superior Court of San Luis Obispo County. V. A. Gregg, Judge.

The facts are stated in the opinion.

G. F. Witter, Jr., for Appellant.

G. & A. Webster, and William Shipsey, for Respondent.

BELCHER, C.—This is an action to foreclose a mortgage, and the only question in the case is as to which of two mortgages on the same land has priority.

The facts are in substance as follows: On October 8, 1892, the defendant, W. H. Fox, executed to the defendant, Stella Payne Meads, his promissory note for seven hundred and fifty dollars, and a mortgage to secure payment of the same on one hundred and sixty acres of land then owned by him. This mortgage was duly recorded November 4, 1892.

On October 10, 1892, Fox and his wife, Cynthia E. Fox, executed to the Farmers' Union of San Miguel their promissory note for four hundred and eighty dollars and twenty cents, and a mortgage to secure payment thereof on the same one hundred and sixty acres of land. This mortgage was duly recorded on the twelfth day of the same month. Subsequently, the Farmers' Union indorsed and assigned said note and mortgage to the First National Bank of San Luis Obispo, and the latter assigned the same to the plaintiff. It does not, however, appear from the complaint or findings when these assignments were made, or that either of them was ever recorded, or that any consideration was paid therefor.

The plaintiff commenced this action to foreclose the last-named mortgage, and the mortgagors suffered their defaults to be entered. The defendant, Meads, answered and filed a cross-complaint, setting up her mortgage and alleging that the lien thereof was prior and superior to that of plaintiff's mortgage, and praying that her mortgage be foreclosed, the property sold,

and the proceeds of the sale, after paying the costs and expenses thereof, be applied first to the payment of the amount found due upon her note and mortgage.

The case was tried, and the court found, among other things, that at the time the note and mortgage mentioned in the complaint were executed to the Farmers' Union it had actual notice of the execution and existence of the note and mortgage held by said Stella Payne Meads, and that at the time of said assignment from the Farmers' Union to said First National Bank the latter had no actual notice of the execution of the note and mortgage made to Stella Payne Meads, and no constructive notice thereof, unless the facts before stated constituted such notice. And, as conclusions of law, the court found that the lien of defendant's mortgage was prior and superior to the lien of the plaintiff's mortgage; that both mortgages be foreclosed and the property sold; that from the proceeds of the sale the expenses of sale be first paid, then the amount due defendant Meads, including her costs and attorney's fees, and then the amount due the plaintiff, its costs and attorney's fees, with the usual order for docketing judgment for deficiencies, if any arise.

A decree of foreclosure was accordingly so entered, from which the plaintiff appeals on the judgment-roll.

The contention of appellant is, that the court erred in giving the Meads mortgage precedence, and it invokes the rule, declared in section 1214 of the Civil Code, that every conveyance of real property "is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for valuable consideration, whose conveyance is first duly recorded." It is said: "The Farmers' Union promptly secured precedence by its record—and that recordation inured to the present holder."

But the Civil Code, section 1217, also declares that "an unrecorded instrument is valid as between the parties and those who have notice thereof." And the court found that the Farmers' Union, at the time its note and mortgage were executed, had actual notice of the execution and existence of the Meads note and mortgage. It cannot, therefore, be successfully claimed that the mortgage first executed was not valid and entitled to

precedence as against the one last executed while it remained in the hands of the mortgagee.

The question then is, Did the assignments of the mortgage last executed vest in the assignees any rights superior to or different from those held by the assignor? As before stated, it is not alleged in the complaint or found by the court at what time either of the said assignments was made. So far as appears, they may both have been made after the Meads mortgage was recorded, and, if so, assignees took the assignments with constructive notice of the prior mortgage. (*Mahoney v. Middleton*, 41 Cal. 41; *Clark v. Sawyer*, 48 Cal. 133.)

Again, it is well settled that one who claims to be a *bona fide* purchaser must plead the facts essential to make him such, that is, that he purchased for value and paid the consideration before he had notice of the prior conveyance or mortgage. In *Eversdon v. Mayhew*, 65 Cal. 167, it is said: "The answer of a *bona fide* purchaser without notice is, says the supreme court of the United States, in the nature of a new case founded on a right and title to real property operating, if made out, to bar and avoid the plaintiff's equity, which must otherwise prevail. To entitle a party to protection as such a purchaser he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment; for if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a *bona fide* purchaser."

This language was used in reference to an alleged *bona fide* purchase of real property, but we consider it equally applicable to a case like this. And as there was no allegation or finding in this case that any consideration was paid for either of the assignments, or that the assignees took the same without at least constructive notice of the prior mortgage, appellant's contention cannot be sustained.

The judgment should be affirmed.

Haynes, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Van Fleet, J., Garoutte, J., Harrison, J.

[S. F. No. 865. In Bank.—November 12, 1897.]

J. J. MORROW, Administrator, etc., Appellant, v. J. H. BARKER, Administrator, etc., Respondent.

ESTATES OF DECEASED PERSONS—PRESENTATION OF CLAIMS—CLAIM OF ANOTHER DECEDENT—STATUTE OF LIMITATIONS —EXCEPTION—CONSTRUCTION OF CODE.—Section 1493 of the Code of Civil Procedure, declaring that all claims arising upon contract, whether the same be due or contingent, must be presented within the time limited in the notice to creditors, and any claim not so presented is barred forever, is a statute of limitations having no exception from its operation saving the claim of a claimant who had no notice by reason of being out of the state; and a court is not authorized to make any other exception to relieve from hardship, or to aid apparent equities; and a claim arising upon contract presented by the administrator of a deceased claimant, after the time for presentation of claims has elapsed, is properly rejected, and an action thereupon is barred by sections 1493 and 1500 of the Code of Civil Procedure.

ID.—RIGHT OF ADMINISTRATOR TO BRING AND MAINTAIN ACTION—CONSTRUCTION OF CODE.—Section 353 of the Code of Civil Procedure, which provides that in case of the death of a deceased person entitled to bring an action before the expiration of the time limited for the commencement thereof, an action may be commenced by his representative after that time, and within six months from his death, does not apply to an action upon a claim against the estate of another deceased person; and section 1500 of the same code, which declares that no holder of any claim shall maintain any action thereon, unless the claim shall first have been presented, is to be construed as precluding the right to bring an action until such presentation, the first essential of the right to maintain or prosecute an action being the right to bring or commence it.

APPEAL from a judgment of the Superior Court of Mendocino County. R. McGarvey, Judge.

The facts are stated in the opinion of the court.

J. A. Cooper, for Appellant.

W. G. Poage, for Respondent.

HENSHAW, J.—On October 25, 1895, the defendant, as the administrator with the will annexed, published notice to creditors in the estate of Susan Berg, deceased, directing all creditors to present their claims within four months after the first publication of the notice.

January 2, 1896, and before the time for presenting claims had expired, John Sundstrom died, without having presented his claim against the estate of Berg. February 20, 1896, letters of administration were duly issued to plaintiff on the estate of John Sundstrom, deceased. February 25, 1896, the four months' time specified in the notice to creditors of the estate of Berg expired, and the claim of Sundstrom had not been presented or allowed. March 6, 1896, the claim upon which this action is based was duly made out as required by the statute, and on March 16th, ten days after the time for presentation had elapsed, was presented to the defendant, as the administrator of the estate of Susan Berg, for allowance. The claim was rejected by the administrator on the ground that it was not presented in time and was barred by the statute.

This action was brought upon the rejected claim. A demurrer to the complaint was interposed on the ground that the cause of action set forth in the complaint is barred by sections 1493 and 1500 of the Code of Civil Procedure. The court below sustained the demurrer, and this ruling of the court is the sole point presented for determination.

Section 1493 of the Code of Civil Procedure declares that all claims arising upon contract (as does the one under consideration), whether the same be due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever. Here is a statute of limitations. The holder of no claim is excepted from its disability, saving him alone who has been absent from the state. A court is not authorized to make an exception to relieve from hardship or to aid apparent equities. (*Tynan v. Walker*, 35 Cal. 640; 95 Am. Dec. 152; *Sichel v. Carillo*, 42 Cal. 499.) As was said in *Estate of Hildebrandt*, 92 Cal. 436: "The statute is imperative and applies to all claims arising upon contracts. If the effect of it is to cause a loss or work a wrong in some particular case, that is a matter for the consideration of the legislature and not the courts."

To escape the effect of this section, however, appellant seeks the aid of section 353 of the Code of Civil Procedure, which provides that in case of the death of a person entitled to bring an action before the expiration of the time limited for the commencement thereof, an action may be commenced by his repre-

sentatives after that time and within six months from his death. But section 1500 of the Code of Civil Procedure declares that no holder of any claim against an estate shall maintain any action thereon unless the claim first shall have been presented. Until such presentation he has no right to bring an action. Such is the very obvious meaning of the section. It would be to accuse the legislature of the shallowest verbal trifling to say that by the two sections it meant that one could have a right to bring an action who at the same time had no right to maintain it. The maintenance of a right of action means the right to prosecute it, and the first essential of the right to maintain or prosecute is the right to bring or commence it.

Situations have been pictured where much hardship might follow this presentation of the law, as where in case of a prolonged contest over the will of one decedent, there may be no personal representative appointed to present his claim against the estate of another until the time has lapsed. If such misfortune should result (and it need not, perhaps, be seriously apprehended in view of the law permitting the appointment of special administrators for like emergencies), it would serve to point an argument to the lawmakers, but not to the judges, whose sole response must be, *ita scripta lex*.

The judgment appealed from is affirmed.

Harrison, J., McFarland, J., Garoutte, J., Van Fleet, J., and Beatty, C. J., concurred.

[S. F. No. 300. In Bank.—November 15, 1897.]

W. J. ADAMS, Respondent, v. EMELINE WALLACE, Appellant.

GUARANTY—NOTE GIVEN TO SECURE ANOTHER—INDORSEMENT PART OF CONTRACT—PAROL EVIDENCE INADMISSIBLE—GUARANTY FOR DEFICIENCY OF MORTGAGE SECURITY.—An indorsement written upon a note at request of the maker before its execution, stating that it is given for the purpose of securing the payment of a note of the same date and amount of another person to the same payee, becomes part of the contract of the maker, though the indorsement is signed by the payee and not by the maker, and the agreement as written, taken with the admissions in the pleadings, constitute a contract of guaranty for the payment of the other note in full;

and parol evidence is inadmissible to vary the terms of the guaranty as expressed by proof that the contract was one of guaranty only for the payment of any deficiency resulting after the sale of property mortgaged by the maker of the other note to the payee as security therefor.

ID.—ADMISSION OF GUARANTY—AVERMENT OF ANSWER.—The defendant cannot complain that the court regarded the contract between the parties as one of guaranty, as distinguished from a general contract of suretyship, where the answer pleads that the contract was one of guaranty made at the request of plaintiff, and not of the maker of the other note, whereby defendant promised and agreed with plaintiff to answer for the debt or default of such maker.

ID.—DISTINCTION BETWEEN GUARANTOR AND SURETY—EXHAUSTION OF CREDITOR'S REMEDIES AGAINST PRINCIPAL DEBTOR.—One who is a mere surety, as distinguished from a guarantor, has the right to demand that the creditor shall first apply the property of the principal debtor to the discharge of the debt; but the creditor has the right to sue a guarantor, upon default of the principal debtor, without proceeding first to realize upon other securities, or to foreclose a mortgage given by such debtor.

ID.—ACTION UPON DEBT SECURED BY MORTGAGE—CONSTRUCTION OF CODE—INDEPENDENT CONTRACT—NOTE GIVEN AS SECURITY.—An action upon a note given as security for another note, which is also secured by mortgage, is not violative of section 776 of the Code of Civil Procedure, but is an action upon an independent contract, with which the mortgagor has nothing to do, and which may be maintained against the maker of such note without foreclosure of the mortgage security.

ID.—PRINCIPAL DEBTOR AND GUARANTOR NOT JOINTLY LIABLE.—There is no privity, or mutuality, or joint liability between the principal debtor and his guarantor.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

J. C. Bates, and A. N. Drown, for Appellant.

William H. Jordan, for Respondent.

HENSHAW, J.—Appeal from the judgment, the evidence being brought up for review by a bill of exceptions.

Plaintiff sued David T. Pierce and Emeline Wallace, averring the following facts: That one David T. Pierce, for a valuable consideration, made and executed to plaintiff his promissory note for the sum of eight thousand dollars, with interest at the rate

of eight per cent per annum until paid. "That, for the purpose of securing the payment of said promissory note, defendant Emeline Wallace did, upon the same day, and for a valuable consideration, make, execute and deliver to plaintiff her promissory note for the sum of eight thousand dollars, bearing interest at the rate of eight per cent per annum." Plaintiff further averred that the Pierce note, though long due, had not been paid; that plaintiff had demanded payment thereof both from Pierce and defendant Wallace, but that they refused and neglected to pay the same, or any part thereof. Plaintiff demanded judgment against the defendants for the sum due.

Defendant Emeline Wallace made answer and pleaded that the note given by Pierce to plaintiff was secured by mortgage upon certain real estate; that as a part of the transaction she executed to plaintiff her note, as a guaranty to him for the payment of any deficiency that might result after the foreclosure of the mortgage.

Before trial plaintiff dismissed his action against the defendant David T. Pierce, and proceeded against the defendant Emeline Wallace alone. Upon the trial, it was shown that the Wallace note bore an indorsement as follows: "This note is for the purpose of securing the payment of note of same date and amount of David T. Pierce to W. J. Adams." This indorsement it appears was upon the instrument at the time that the defendant signed the same, but the indorsement itself is not signed by defendant, but by plaintiff.

Plaintiff after formal proof of the execution and nonpayment of the Pierce note, and of the above-quoted indorsement upon the Wallace note, rested his case. Defendant sought to show, in accordance with the averments of her answer, that the Pierce note was secured by a mortgage, and that her contract with plaintiff was that of a guarantor of any deficiency after foreclosure proceedings. This proof the court refused, under objection, to allow her to make, holding that the indorsement upon the back of the note constituted her contract of guaranty, and that under that contract she had bound herself for the payment of the note, and not for the payment of any deficiency which might result after the exhaustion of other security.

Appellant cannot be heard to complain that her contract with plaintiff was regarded by the court as a contract of guaranty (Civ. Code, sec. 2787) as distinguished from a general contract of surety (Civ. Code, sec. 2831), for by her answer she pleads her contract to have been one of guaranty. At the request of plaintiff, she pleads, and not of Pierce, she promised and agreed with plaintiff to answer for the debt or default of Pierce. Were she a mere surety, as distinguished from a guarantor, she would have the unquestioned right to demand that plaintiff should first apply to the discharge of the debt the property of the principal, Pierce, which had been mortgaged. (Civ. Code, secs. 2849, 2850.) Upon the other hand, if she be a guarantor for the payment of the debt upon default, then it would matter not whether there were other security for the payment of that debt; the principal creditor would have the right to prosecute his action against the guarantor, without proceeding to realize upon other securities or without going into equity to foreclose his mortgage. (*London etc. Bank v. Smith*, 101 Cal. 415; *Brandt on Suretyship and Guaranty*, 97; *Baylies on Sureties and Guarantors*, 189, 303, 304, 305.)

When it is come to consider the contract which existed between plaintiff and defendant, as disclosed by the pleadings, it is seen that the complaint does no more than to charge in the language of the written indorsement. This indorsement, put upon the instrument at defendant's request and before her execution of it, became a part of her contract. The answer, however, distinctly avers the contract to have been one of guaranty for the payment of any deficiency, and the rejected evidence of defendant went to establish these averments. The evidence upon this point was properly rejected. It was an attempt to vary by parol the clear and precise terms of a written contract. The contract as written was a guaranty for the payment of the Pierce note. The contract sought to be proved was for the payment of any deficiency resulting after sale of the mortgaged property—a contract so different from the one expressed by the writing as to need no more than the bare statement of it to show that its proof, if permitted, would have been not only to vary the writing, but absolutely to substitute another agreement for it. Defendant is not here seeking a reformation of the written contract, but stands upon her right

to make the offered proof by parol against her written agreement. This cannot be done.

The contention that the action cannot be maintained at all, as being violative of the provisions of section 776 of the Code of Civil Procedure, is not well taken. This is not an action for the collection of the Pierce debt as such, even if it be conceded that this debt was secured by mortgage. It is an action upon an independent contract of the defendant, with which Pierce had nothing to do, and which might have been entered into by the parties to it without his knowledge or against his wishes. There is no privity, or mutuality, or joint liability between the principal debtor and his guarantor. (*Bull v. Coe*, 77 Cal. 54; 11 Am. St. Rep. 235; Baylies on Sureties and Guarantors, 4; *Cole v. Watertown Merchants' Bank*, 60 Ind. 350.)

The judgment is affirmed.

Temple, J., Van Fleet, J., and Harrison, J., concurred.

Hearing in Bank denied.

[S. F. No. 772. Department One.—November 17, 1897.]

DANIEL HURLEY, Respondent, v. JOHN RYAN, Administrator, etc., Appellant.

ACTION FOR MONEY UPON CONTRACT—INSUFFICIENCY OF COMPLAINT—FAILURE TO AVER NONPAYMENT.—In an action upon contract to recover money, the breach of the contract to pay is of the essence of the cause of action, and must be alleged; and a complaint which does not allege that the debts sued upon have not been paid fails to state a cause of action, and a demurrer thereto upon that ground should be sustained.

1D.—DEMURRER NOT WAIVED.—A demurrer for insufficiency of the complaint to state a cause of action is not waived by answer, whether filed at the same time or subsequently, nor is such defect in the complaint cured by verdict.

APPEAL from a judgment of the Superior Court of Monterey County. N. A. Dorn, Judge.

The facts are stated in the opinion.

Frank J. Murphy, for Appellant.

Parker & Sargent, for Respondent.

CHIPMAN, C.—Action against defendant, as administrator, for money expended as funeral expenses of deceased, and for expenses of administration and traveling expenses, while plaintiff was special administrator of defendant estate. As a second cause of action plaintiff claims for services in nursing and providing board and lodging for deceased in his lifetime. Defendant demurred to the complaint, alleging insufficiency of facts to constitute a cause of action, which was overruled, and defendant answered denying the allegations of the complaint and setting up a counterclaim. The cause was tried by a jury, and verdict was given for plaintiff for three hundred and twenty-five dollars, and judgment was accordingly entered. The appeal is on the judgment-roll alone.

The only point made by appellant is, that the complaint fails to state a cause of action, for the reason that it does not allege that the debts sued upon have not been paid. The action is upon contract, and it is claimed by appellant that the breach to pay is of the essence of the cause of action and must be alleged. (Citing *Ryan v. Holliday*, 110 Cal. 337; *Barney v. Vigoreaux*, 92 Cal. 631; *Notman v. Green*, 90 Cal. 172; *Richards v. Travelers' Ins. Co.*, 80 Cal. 505; *Scroufe v. Clay*, 71 Cal. 123; *Roberts v. Treadwell*, 50 Cal. 520; *Davanay v. Eggenhoff*, 43 Cal. 395.) Respondent files no points and authorities. The rule is unquestionably as claimed by appellant. There is no attempt in the complaint to allege that the debt has not been paid, and the demurrer should have been sustained. "A demurrer is not waived by filing an answer at the same time." (Code Civ. Proc., sec. 472,) and *a fortiori* it is not waived by the filing of an answer subsequently to the filing and overruling of the demurrer. (*Curtiss v. Bachman*, 84 Cal. 216.) Nor is the defect cured by the verdict. (*Richards v. Travelers' Ins. Co.*, *supra*.) This last case is in all respects similar to the one at bar. There was there, as here, a demurrer overruled, answer, trial, verdict by jury, and appeal upon the judgment-roll.

The judgment should be reversed.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed. Garoutte, J., Harrison, J., Van Fleet, J.

[Crim. No. 322. Department One.—November 17, 1897.]

THE PEOPLE, Respondent, v. ALBERT KNOX, Appellant.

CRIMINAL LAW—FALSE IMPERSONATION OF OFFICER—INSUFFICIENT INFORMATION—CONSTRUCTION OF CODE.—Section 529 of the Penal Code, which provides for the punishment of "every person who falsely personates another," etc., does not apply to a case where a party falsely assumes an official character, but is intended to cover only acts done by one person while representing himself to be another and different person; and an information charging a defendant with impersonating an officer of the law and a constable, and performing a specified act in such assumed character, without stating the name of the officer of the law or constable which defendant represented himself to be, is insufficient.

ID.—AMBIGUOUS INFORMATION.—The mere fact that an information is susceptible of widely different constructions renders it unsatisfactory in the eyes of the law.

APPEAL from a judgment of the Superior Court of Napa County. E. D. Ham, Judge.

The facts are stated in the opinion of the court.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Appellant.

E. L. Webber, and W. P. Myles, for Respondent.

GAROUTTE, J.—This appeal is prosecuted by the people to test the validity of an order of the superior court sustaining a demurrer to an information filed against the defendant Knox. This information is based upon section 529 of the Penal Code, which declares that "every person who falsely personates another, and in such assumed character either becomes bail or surety for any party . . . is punishable," etc. By the information in this case the defendant is charged with falsely personating another, in this, that he did "willfully and unlawfully falsely personate another, to wit, an officer of the law and a constable, and in such assumed character did take away one Anita Lynde, a child of the age of four years," etc. The information further alleged that he was not at the time an officer of the law or constable.

This information is susceptible of but two constructions, either of which renders it objectionable. If the pleading be construed as one charging the defendant as falsely representing himself to

be an officer of the law and a constable, then it must fall, for the section is not broad enough to cover such a state of facts. The section is intended to cover acts done by one person while representing himself to be another and different person. It does not refer to a case where a party falsely assumes an official character. If the remaining construction of the pleading be adopted, then it is demurrable in not stating the name of the officer of the law or constable which defendant represented himself to be. The defendant is entitled to be notified of that fact. It might be further said that the pleading is not satisfactory in the eyes of the law from the mere fact that it is susceptible of the widely different constructions suggested.

Judgment affirmed.

Van Fleet, J., and Harrison, J., concurred.

[S. F. No. 593. Department Two.—November 18, 1897.]

NICK JOSICH, Respondent, v. AUSTRIAN BENEVOLENT
SOCIETY OF SAN JOSE, Appellant.

BENEVOLENT SOCIETY—EXPULSION OF MEMBER—USE OF OPPROBRIOUS LANGUAGE—INTERFERENCE BY COURT.—Where the constitution of a benevolent society provides that one of its objects is the propagation of unity, friendship, and brotherly love among its members, and gives the society the right to expel a member who violates any of the principles of the society or offends against the constitution, the question whether opprobrious language used by a member toward his fellows is a violation of its constitution or principles is for the society to determine, and its action in expelling a member therefor, after due notice and a fair trial, will not be interfered with by the courts.

ID.—PROPERTY RIGHTS OF MEMBER.—The interest which a member has in the property of such a society is only incidental to his membership, and will cease upon his ceasing to be a member. If he has forfeited his right of membership by reason of his conduct, this interest in the property will not prevent his expulsion, or give to courts the right to prevent an investigation of the charge, or to determine its sufficiency.

APPEAL from a judgment of the Superior Court of Santa Clara County. W. G. Lorigan, Judge.

The facts are stated in the opinion of the court.

James R. Lowe, and Charles Clark, for Appellant.

G. A. Danziger, and N. E. Wretman, for Respondent.

McFARLAND, J.—Defendant is a corporation organized under the laws of this state. Plaintiff, who was a member of the corporation, filed his petition for a writ of mandate, alleging his illegal expulsion by the defendant society, and praying that he be restored to full membership, as theretofore. The plaintiff had judgment in the lower court as prayed for, and the defendant appeals from the judgment.

It is not contended by respondent that he did not have a fair trial before the society after due notice; and the fact that he had such trial appears from the findings. It appears very fully that the only ground upon which the court below rendered its judgment was that stated in the ninth finding, which is as follows: "That the charges upon which the plaintiff and petitioner was tried and expelled constitute no offense against the said society, its constitution or by-laws, or rules or regulations, or resolutions, and that the said defendant society had no power, authority, or jurisdiction to try the said plaintiff and petitioner herein upon he said charge, or to expel him therefore; that there never was a constitutional provision, or by-law, or rule, or regulation, or resolution of said defendant society making or prescribing such charge a ground for expulsion."

The constitution of the society provides, among other things, as follows: "The object of the Austrian Benevolent Society of San Jose shall be relief of the sick members, the interment of the deceased members, the moral tuition of each other, and the propagation of general intelligence, unity, friendship, and brotherly love among all members." Article II, section 1, provides as follows: "Any member who shall violate any of the principles of the society or offend against the constitution, by-laws, or rules of the society shall be fined and reprimanded or expelled as the by-laws may direct or the society determine." Article XV, section 5, leaving out those parts of it not pertinent here, is as follows: "If any member shall be guilty of improper conduct, either in or out of the hall, . . . he shall be fined, suspended, or expelled at the discretion of the society."

The charge against respondent upon which he was expelled was made by A. Anticevich, a member of the society, and is as follows:

"San Jose, May 14, 1895.

"To the president, vice-president, officers, and members of the Austrian Benevolent Society of San Jose.

"Sirs and brothers: I here, by this present, bring a formal charge against Bro. N. Josich. On the evening of April 9, 1895, I went to Bro. N. Josich's house on an official visit (visiting committee) to inquire as to the state of his health and make report on that same evening to the society. Bro. N. Josich received me somewhat cold, and after I had asked him how is his health was he answer me, 'There is a lot of sons of dogs.' I reply, 'No, Nick,' and he answer, 'Yeas, Anticevich, their are lots of yours.' Now, brother president, officers, and members, I do bring a charge to Bro. N. Josich for such language used to one officer of our society.

Fraternally yours,

"A. ANTICEVICH."

This was certainly most unfraternal language used toward not only the party making the charge, but toward a large number of the other members; and the judgment of the court below cannot be sustained, unless it can be held that the society itself had no right or jurisdiction to determine that the use of it was a violation "of the principles of the society" or an offense "against the constitution, by-laws, or rules of the society"—the purpose of the society as expressed in its constitution being, among other things, "the moral tuition of each other, and the propagation of general intelligence, unity, friendship, and brotherly love among all members." We think that the power to determine that question was with the society itself and assented to by the respondent by the contract which he made when he became a member of the society; and that what is proper fraternal conduct of a member of a society like the appellant is not a matter to be taken out of the hands of the society by a court, where the accused has had due notice and a fair trial in accordance with the constitution and by-laws of the society. As this court said in *Von Arx v. San Francisco etc. Verein*, 113 Cal. 379: "Where the society has by-laws not unreasonable in their character which are applicable to

the difficulty out of which the litigation arises, and the asserted rights of the parties have been determined by the society in accordance with such by laws, a court will not ordinarily interfere." The contention of the appellant is, we think, fully sustained by the recent decision of this court in *Lawson v. Hewel*, 118 Cal. 613. The property rights claimed by the appellant in that case were substantially as those claimed by the respondent in the case at bar; and the court there said: "His interest in the property thus appears to be only incidental to his membership, and will cease upon his ceasing to be a member. If he has forfeited his right of membership by reason of his conduct, this interest in the property will not prevent his expulsion, or give to courts the right to prevent an investigation of the charge, or themselves to determine its sufficiency." And the court further say, quoting from the opinion in *State v. Odd Fellows' Grand Lodge*, 8 Mo. App. 148: "When men once associate themselves with others as organized bands, professing certain religious views, or holding themselves out as having certain ethical or social objects, and subject themselves to a common discipline, they have voluntarily submitted themselves to the disciplinary power of the body of which they are members, and it is for the society to know its own." When a member of such an association has been expelled, a court will not interfere on his behalf, unless it be shown that he has not had due notice of the charge against him and a fair trial; or that the rules which he is charged with violating are immoral, or against public policy, or contrary to the law of the land; or that they are clearly in contravention of natural justice; or that the decision against him has been made *mala fides* or from malice. And nothing of this kind appears in the case at bar. Persons who contemplate becoming members of a society like the respondent should understand that their rights as such members, will as a general rule, be determined by those with whom they thus voluntarily associate themselves, and that courts will not interfere with their fraternal troubles except in such extreme cases as are above indicated.

It is contended by respondent that the real merits of the case cannot be reached on this appeal because nothing except the judgment-roll is here. But the transcript shows that the decision was entirely based upon the ninth finding above quoted; which

is the same substantially as an order sustaining a general demurrer to the complaint, and shows clearly the basis upon which the judgment rests.

The judgment is reversed.

Temple, J., and Henshaw, J., concurred.

[Sac. No. 247. Department Two.—November 18, 1897.]

FRED BANTA, Appellant, v. ARNOLD WINK et al., Respondents.

ACTION FOR PARTNERSHIP ACCOUNTING—VENUE—CHANGE OF PLACE OF TRIAL—NONRESIDENT DEFENDANTS. — An action, the purpose of which is to have it adjudged that the plaintiff is the owner of an undivided interest in all the property, business, proceeds, and profits of an alleged copartnership, and for an accounting thereof, must be tried in the county in which the defendants, or some of them, reside at its commencement; and it is only where none of the defendants are residents of the state that the action may be tried in any county which the plaintiff may designate in the complaint; but when a portion of the defendants are nonresidents, and the remainder are residents of the state, only those who are residents of the state need join in a demand to change the place of trial; and the fact that nonresidents, who cannot move for a change of venue, unite in demanding such change, cannot deprive the other defendants of the right to make the demand, and to have the case tried in the county in which the defendants, or some of them, resided when the action was commenced.

APPEAL from an order of the Superior Court of Fresno County granting a change of the place of trial of an action. E. W. Risley, Judge.

The facts are stated in the opinion.

L. L. Cory, for Appellant.

F. H. Short, H. H. Welsh, and Bruner & Bruner, for Respondents.

BELCHER, J.—This action was commenced in the superior court of the county of Fresno, on December 16, 1895. The purpose of the action was to have it adjudged that the plaintiff was the owner and entitled to the possession of an undivided one-third interest in all the property, business, proceeds, and profits

of an alleged copartnership, and for an accounting. Five parties were named in the complaint as defendants, of whom two, Arnold Wink and Isaac Banta, resided in the state of Oregon; two, George C. Holbrook and W. C. Weymouth, resided in the city and county of San Francisco; and one, James Tiscornia, resided in the county of Calaveras. Wink and Banta were temporarily in the county of Fresno when the action was commenced, and were at once served with the summons. Thereafter, on the 26th of the same month, they appeared by their attorneys and demurred to the complaint. The other defendants were served later, and on January 24, 1896, appeared by their attorneys and demurred to the complaint, and at the same time served upon the attorney of plaintiff and filed affidavits of merits and stating the places of residence of said defendants, and a demand in writing that the trial be had in the city and county of San Francisco, and also a notice that on a day named they would apply to the court for an order changing the place of trial as demanded. Accompanying these papers was a notice, signed by Wink and Banta, stating that they united with their codefendants in demanding that the place of trial be changed as requested by them. The motion was heard by the court and granted, and from that order the plaintiff appeals.

The contention of appellant is, that all of the defendants in an action must join in a motion for a change of the place of trial, and that as the defendants, Wink and Banta, had been served in the county of Fresno, and in due time had appeared and demurred to the complaint without making any motion for a change of the place of trial, they could not thereafter join with the other defendants in any motion asking for such change; and that under the statute neither they nor the other defendants were entitled to the order made, but plaintiff was thereafter entitled, as a matter of right, to have the action tried in the county in which it was commenced.

An action like this "must be tried in the county in which the defendants, or some of them, reside at the commencement of the action; or, if none of the defendants reside in the state, . . . the same may be tried in any county which the plaintiff may designate in his complaint." (Code Civ. Proc., sec. 395.)

"If the county in which the action is commenced is not the

proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county." (Code Civ. Proc., sec. 395.)

As defendants Wink and Banta did not reside in this state, they could not move for a change of venue, but that fact did not deprive the other defendants of the right to have the case tried in the county in which they, or some of them, resided at the commencement of the action. It is only when none of the defendants reside in the state that the action may be tried in any county which the plaintiff may designate in his complaint. It was not necessary for Wink and Banta to join in the demand for a change, but was only necessary that all those who had a right to make the demand should join in doing so. This they did, and the court properly granted the motion.

The order should be affirmed.

Haynes, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed.

Temple, J., Henshaw, J., McFarland, J.

[L. A. No. 335. Department Two.—November 18, 1897.]

C. S. WILLIAMS, Respondent, v. H. L. BORGWARDT, Jr.,
Appellant.

SALES—STATUTE OF FRAUDS — LACK OF DELIVERY AND CHANGE OF POSSESSION—TITLE OF VENDEE—TRANSFER—POSSESSION TAKEN BY BONA FIDE PURCHASER.—A sale of personal property, though not followed by an immediate delivery and actual and continued change of possession, as required by section 3440 of the Civil Code, is not a nullity, but is good against all the world except the creditors of the vendor, and is good against them also except when attacked in legal proceedings for the collection of their debts; and the vendee, being the owner, can convey title thereto, and the purchaser would, in any event, acquire a title good against all the world except the creditors of the original vendor, and against them also if

he was a purchaser in good faith, for value, and without notice of their claims, and had finally acquired possession of the property prior to the seizure of it, under attachment by them.

ID.—SALE OF PERSONAL PROPERTY BY AGENT—POWER OF ATTORNEY NOT EXCLUSIVE OF OTHER AUTHORITY—EVIDENCE—FINDING.—Although a sale of personal property by an agent for the vendor may not be authorized by a written power of attorney given to the agent, it is not necessary that the authority to make the sale should be found in that instrument, nor could its provisions limit the power of the vendor to direct the sale in other modes; and the court may find that the authority of the agent existed in fact upon testimony to that effect.

ID.—CONSTRUCTION OF CODE—TRANSFER OF PROPERTY NOT IN POSSESSION OF VENDOR.—Section 3440 of the Civil Code, requiring an immediate delivery and actual and continued change of possession of property sold, has no application where the property is not in the possession nor under the control of the vendor at the time of the sale; and it is sufficient if the vendee subsequently obtains possession of the property, as against creditors of a prior owner of the property, who sold to such vendor without delivery of possession.

ID.—PURCHASE FOR VALUE—PRESUMPTION OF GOOD FAITH.—Where value is paid for the purchase of personal property, the purchase is presumed to be in good faith, and without notice of the rights of creditors of a prior owner, or of anything that could render the prior sale to his vendor fraudulent, in the absence of proof to the contrary.

ID.—SALE OF PROPERTY UNDER EXECUTION—PURCHASE BY VENDEE—ESTOPPEL.—The purchase of personal property at execution sale by a *bona fide* purchaser from a vendor to whom no possession was delivered under sale from a prior owner, the execution having been issued upon a judgment rendered in an attachment suit brought by creditors of such prior owner, in which the property was attached while in possession of such *bona fide* purchaser, does not estop the purchaser from denying that the property was rightfully attached as the property of such prior owner.

ID.—REPLEVIN—DAMAGES—EFFECT OF RECOVERY OF PROPERTY BY PLAINTIFF—REVIEW UPON APPEAL.—Although the fact that the plaintiff had recovered the possession of the property by purchase at an execution sale, before the trial of an action brought to replevy the property from the sheriff, may change the rule of damages, yet where no such point is made upon appeal, and the evidence shows that the amount of damages rendered is about the same as it would have been if the correct rule of damages had been followed, a reversal of the judgment is not called for upon that ground.

APPEAL from a judgment of the Superior Court of Kern County and from an order denying a new trial. A. R. Conklin, Judge.

The facts are stated in the opinion of the court.

B. Brundage, for Appellant.

E. Rousseau, for Respondent.

TEMPLE, J.—This is an action of claim and delivery to recover certain sheep. The defendant, who was sheriff of Kern county, justified under a writ of attachment issued in a suit brought by John H. and Harry E. Wise against J. V. Caldwell. The sheep were attached as the property of Caldwell. Judgment was afterward entered in favor of the plaintiffs in the attachment suit, and the sheep were sold to satisfy the judgment.

The facts shown by the evidence in the statement on motion for a new trial are: J. V. Caldwell was formerly the owner and in possession of the sheep. Some time in 1894 he sold the sheep to his sister, Mrs. Griffith, but there was not an immediate or any delivery of possession of the property to Mrs. Griffith. The vendee left the property with the vendor, who cared for it after the sale as before. There was nothing to indicate a change of ownership or control. About a year afterward they were attached by Alexander & Weill for a debt due from Caldwell. Mrs. Griffith compromised the suit by giving up some of the sheep to Alexander & Weill in payment of their demand against Caldwell. Before the sheep were released by the sheriff, but after she had made the compromise with Alexander & Weill, she sold the residue to the plaintiff. There was not an immediate delivery of the sheep to plaintiff, nor could there have been, for the reason that the sheep were not in the possession nor under the control of Mrs. Griffith, and for the same reason section 3440 of the Civil Code does not apply to the transaction. Some two days afterward the attachment was released, and plaintiff then took possession and commenced driving them toward Bakersfield. On the way they were again attached at the suit of J. H. and H. E. Wise, and thereafter demand was made upon the sheriff by plaintiff for the property, which being refused plaintiff brought this action.

The defendant questions the sale to plaintiff as not authorized by the power of attorney. It was not necessary that the authority should be found in that instrument. The provision there

found did not and could not limit the power of Mrs. Griffith to direct the sales in other modes. Caldwell testified that he had such authority, and the court so found.

The sale to Mrs. Griffith was not a nullity. It was good against all the world except the creditors of Caldwell, and was good against them also, except when attacked in legal proceedings for the collection of their debts. They may cause the property to be appropriated to the payment of their debts only in the modes provided by law. (Bump on Fraudulent Conveyances, sec. 450.) Being the owner she could convey the same, and a purchaser from her would acquire, in any event, a good title against all the world except such creditors, and against them also if he was a purchaser in good faith for value and without notice. (*Paige v. O'Neil*, 12 Cal. 483.) That was a case similar to this and the court said: "Though this sale was void, as against the creditors of Kelty and Reynolds, in being made to the knowledge of McCloud, to prevent Fisher from reaching the property on execution, or by attachment, it was good as between Kelty and Reynolds and McCloud; and a sale by the latter to the plaintiff, for a valuable consideration, without notice of the original fraud, passed a perfect title. The plaintiff could not be afflicted in his purchase, though the title of his vendor was acquired by fraud."

It was not shown that the plaintiffs in the attachment suit were creditors of Caldwell when the sale was made to Mrs. Griffith, nor—if that could have made any difference—that their debt was contracted while the property remained in the possession of Caldwell and apparently his, without knowledge on the part of Wise of the sale to Mrs. Griffith. Since the title of Mrs. Griffith was good, except as to a possible class of persons, it was incumbent upon the defendant to show the existence of such a class and that the attaching creditors belonged to that class.

It has been shown beyond controversy that plaintiff was a purchaser for a valuable consideration, and the presumption is that he was a purchaser in good faith, and there is no evidence which tends to the contrary. It does not appear that he knew of the indebtedness of Caldwell to the plaintiffs in the attachment suit before the writ of attachment was served. There is nothing to show that Caldwell owned other debts except the two which were paid by the sale to plaintiff, or before that time. It was not shown

that plaintiff knew, or had reason to suspect, that when Caldwell sold to Mrs. Griffith there had not been a sufficient delivery of the property to her, followed by a continued change of possession. Indeed, it is doubtful if it can be said that there was proof that Williams knew that Caldwell had ever owned the property, although that may be assumed from the fact that a part of the consideration for the sheep was a debt due him from Caldwell. There is, in short, no evidence tending to show that Williams was not a purchaser in good faith and without notice of anything which could render the sale fraudulent.

Before the trial of this action the attachment suit had gone to judgment, and an execution was issued under which the sheep were sold. At that sale the plaintiff was the purchaser of all the sheep, and in that mode obtained possession of all the property which he alleges was detained from him.

The only point made at the trial, or which is made here, in regard to this, is that defendant claims that thereby plaintiff is estopped from denying that the sheep were rightfully attached as the property of Caldwell. The court found, and I think correctly, that this did not constitute an estoppel. Perhaps the fact that the plaintiff had recovered the possession of his property ought to have changed the rule of damages. But as no such point is made, and as the evidence shows that had the rule of damages, which I deem the correct rule, been followed, the amount of the judgment would have been about the same as it is, a reversal is not called for.

The judgment and order are affirmed.

Henshaw, J., and McFarland, J., concurred.

[Crim. No. 327. Department Two.—November 22, 1897.]

THE PEOPLE, Respondent, v. JOHN LEE, Appellant.

CRIMINAL LAW—RAPE—GIRL UNDER AGE OF CONSENT—INSTRUCTION—IMPROPER REQUEST—ABSENCE OF OUTCRY AND IMMEDIATE DISCLOSURE.—Upon the trial of a defendant charged with the crime of rape, committed upon a girl under fourteen years of age, it is proper to refuse to instruct the jury, upon request of the defendant, that the facts that the prosecutrix made no outcry and no immedi-

ate discourse, and that there was but little indication of violence to her person, "are proper to be taken into consideration by the jury, as throwing doubt upon the assumption that the act was committed at all," the consent of the girl being immaterial, as affecting the guilt of the defendant, and the undisputed facts being such as to show that there was no probative force in the alleged facts, and the instruction being a clear invasion of the province of the jury, and involving an assumption that certain controverted facts had been established by the evidence.

ID.—CONSUMMATION OF CRIME—CONFLICTING EVIDENCE—EXPERT TESTIMONY.—Where the testimony of the prosecutrix and of the defendant is conflicting as to whether the crime of rape was consummated or only attempted, and the circumstances shown by the testimony of the medical experts tended to show that there was not a complete sexual act, but they are all so far consistent with the evidence of the prosecutrix that enough may have been done to constitute the crime of rape, a verdict of conviction of that crime will not be disturbed upon appeal for insufficiency of the evidence.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from orders denying a motion in arrest of judgment, and denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

Frank F. Davis, and A. M. Cates, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

TEMPLE, J.—The defendant was convicted of the crime of rape, charged to have been committed upon a child thirteen years of age. The defendant contends that the girl consented, but that the offense was not consummated. Upon these two points there was a conflict between the defendant and the prosecutrix.

A reversal is claimed on two grounds:

1. It is contended that the court erred in refusing to instruct the jury, as asked by the defense, to the effect that the facts that the prosecutrix made no outcry and no immediate disclosure, and that there was but little indication of violence to her person, "are proper to be taken into consideration by the jury, as throwing doubt upon the assumption that the act was committed at all."

The girl was under the age of fourteen and, therefore, whether she consented or not was immaterial, as affecting the guilt of

the defendant. But the undisputed facts show that enough was done to induce the prosecutrix to make an outcry, if she believed it would be of any avail or was not so intimidated that she was afraid to do so, if she knew or realized the extent of the outrage upon her and was not consenting thereto. There was, therefore, no probative force in the alleged fact.

But in no case should such an instruction be given. It would have been a clear invasion of the province of the jury, and such interference is forbidden in this state. The court may be called upon under some circumstances to say whether there is or is not any evidence tending to prove an essential fact, but the court should never do this to aid the jury in determining a controverted issue of fact, or when it is open to reasonable dispute as to whether such evidence does tend to prove the alleged fact. These are questions as to the effect and value of evidence, and when they are or may be matters of reasonable controversy they are exclusively for the jury; and this is especially so when it is claimed that the alleged facts tend to prove the guilt or innocence of the accused. That is the precise issue which the jury are to decide.

And then, again, the instruction assumed that certain controverted facts had been established by the evidence. This, of itself, was a sufficient reason for refusing the instruction.

2. The other point is that the evidence did not justify the verdict. The question here is simply whether the defendant succeeded in consummating the crime. Defendant admits that he made the attempt, but claims that he failed. The only two witnesses to the important fact differ. The circumstances shown by the testimony of the medical experts tend to show that there was not a complete sexual act, but they are all so far consistent with the evidence of the prosecutrix that enough may have been done to constitute the crime of rape.

The judgment and orders appealed from are affirmed.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 164. Department One.—November 23, 1897.]

CALIFORNIA IMPROVEMENT COMPANY, Appellant, v.
JULIUS QUINCHARD, Respondent.

STREET IMPROVEMENT — RIGHT OF ELECTION OF OWNERS — PREMATURE CONTRACT INVALID—VOID ASSESSMENT.—Under section 5 of the street improvement act of 1889, which provides for a right of election of the owners of three-fourths of the frontage to take the work of a proposed street improvement and to enter into a written contract therefor within a specified period, and that if they fail so to elect and contract within such period, the superintendent of streets shall enter into a contract with the original bidder to whom the contract was awarded, until the expiration of the period within which the owners are allowed to enter into the contract, the superintendent of streets has no power to enter into a contract with the bidder and a contract entered into with him prior to expiration of that time is invalid, and cannot form the basis of an assessment.

APPEAL from a judgment of the Superior Court of Alameda County. A. L. Frick, Judge.

The facts are stated in the opinion of the court.

Chickering, Thomas & Gregory, and C. Harding Tebbs, for Appellant.

R. M. F. Soto, for Respondent.

THE COURT.—Action upon a street assessment. Section 5 of the street improvement act (Stats. 1889, p. 162) provides that the owners of three-fourths of the frontage may elect to take the work and enter into a written contract therefor, at the price at which it was awarded, within ten days after the first posting and publication of the notice of award; and that, if they fail to elect to take the work and enter into a contract therefor within said ten days, the superintendent of streets shall enter into a contract with the original bidder to whom the contract was awarded. Until the expiration of the period within which the owners are allowed to enter into the contract the superintendent of streets has no power to enter into a contract with the bidder, and a contract entered into with him prior to that time is invalid, and cannot form the basis of an assessment. (*Burke v. Turney*, 54 Cal. 486; *Manning v. Den*, 90 Cal. 610; *Perine v. Forbush*, 97 Cal. 305; *Perham v. Kuper*, 61 Cal. 331.)

The contract in the present case was awarded to the plaintiff April 6, 1891. The first posting and publication of the notice of this award was made April 9, 1891. The contract was entered into by the plaintiff with the superintendent of streets on April 20, 1891. The ninth day of April, 1891, fell on Thursday, and, as the 19th was Sunday, the owners had the whole of the 20th in which to enter into the contract. (Civ. Code, sec. 10; *Diggins v. Hartshorne*, 108 Cal. 154.) The contract between the plaintiff and the superintendent of streets was, therefore, entered into at a time when the superintendent had no power to make it, and under the authority of the foregoing cases must be held invalid.

The judgment is affirmed.

[Crim. No. 319. Department One.—November 23, 1897.]

THE PEOPLE, Respondent, v. JOSIAH LOVREN, Appellant.

CRIMINAL LAW — TRAIN WRECKING—CONSTITUTIONALITY OF STATUTE—

TITLE OF ACT—CONSTRUCTION—BOARDING PASSENGER TRAIN WITH INTENT TO ROB THE SAME.—The act of the legislature commonly known as the "train wrecking act," which is designated by title as an act "relating to train wrecking," does not violate the provision of the constitution which declares that every act of the legislature shall embrace but one subject, which shall be expressed in its title, because in the body of the act a person is declared guilty who unlawfully boards a train with intent to rob the same, such provision not being intended to punish train robbery as such, but to prevent train wrecking, and in that respect stands in relation to the title as other provisions of the act.

ID.—"ROBBING PASSENGER TRAIN"—ACT NOT TO BE CONSTRUED AS MEANINGLESS.—The phrase "robbing a passenger train" is not to be construed as meaningless or absurd; and though the act is crude, it is not to be nullified by the courts, it being the purpose of the act to prevent train wrecking. A person is guilty of the offense of "boarding a passenger train with intent to rob the same" when he unlawfully boards a passenger train with the intention to take by force and intimidation the control and management thereof from the employees, and thereupon to commit larceny or robbery thereon.

ID.—EVIDENCE—CONSPIRACY—DECLARATIONS OF CONSPIRATORS.—Where the evidence is sufficient to establish a conspiracy between the defendant and other persons to board a passenger train with intent to commit robbery, all statements, acts, and declarations made by the other conspirators, pending the commission of the crime, are competent evidence against the defendant.

ID.—CONSPIRACY TO ROB NORTHBOUND TRAIN—CHANGE OF PURPOSE TO SOUTHBOUND TRAIN—DECLARATION OF CO-CONSPIRATOR.—Where the conspiracy disclosed by the evidence originally contemplated the robbery of a northbound train, and the southbound train upon the same railroad was the one in fact boarded, it seems that such change in the plans of the conspirators at the last moment as to the particular train to be boarded and robbed, even if made without the knowledge of such change coming to the defendant, or his personal presence at the commission of the offense, would not demand his acquittal; but the declaration of a co-conspirator that defendant said, at a time when it was the intention to attack the southbound train, that there would be more money upon the southbound than upon the northbound train, is competent evidence to prove that defendant was an accessory to the offense committed.

ID.—EXPERT EVIDENCE—TEXTURE OF CLOTH.—The question whether or not two pieces of cloth were of the same texture and quality is a proper subject for the expert testimony of persons experienced in handling such cloths.

APPEAL from a judgment of the Superior Court of Tulare County and from an order denying a new trial. Wheaton A. Gray, Judge.

The facts are stated in the opinion of the court.

Lillie & Clack, and Hannah & Miller, for Appellant.

W. F. Fitzgerald, Attorney General, and C. N. Post, Deputy Attorney General, for Respondent.

GAROUTTE, J.—The defendant has been convicted of violating an act of the legislature commonly known as the “train wrecking act.” He was charged by the information with unlawfully boarding a certain passenger train with intent to rob said train.

It is claimed that the act is unconstitutional in this, that it violates that provision of the constitution which declares that every act of the legislature shall embrace but one subject, which subject shall be expressed in its title. By its title this act is designated as an act “relating to train wrecking”; and in the body of the act we find the provision which declares a party to be guilty who unlawfully boards a passenger train with intent to rob the same. The defendant is here charged with violating this particular provision of the act, and it is now claimed that such provision bears upon train robbery, and not train wrecking,

and for that reason is objectionable to that portion of the constitution to which reference has been made. The contention has no force. This court has held that every provision of the act directly applies to train wrecking, and that the provision quoted does not apply to train robbery. Indeed, robbery of a train is not made an element of the offense under any provision of the act and is in no way material in proving a case upon an information like the one before us. Prior to the passage of this act there was ample law in this state covering all cases of robbery, and no legislation was demanded to that end. This provision of the act was clearly made to prevent train wrecking and in that respect stands exactly as all other provisions of it. It is said in *People v. Thompson*, 111 Cal. 246, and reaffirmed in *People v. Thompson*, 115 Cal. 160, that: "The whole tenor and purpose of the act is directed against train wrecking, and this is true as to subdivision 2 equally with all other subdivisions. At first glance this clause would seem to be directed toward the suppression of the crime of robbery, but the offense of robbery is only incidentally involved, and the prevention of the wrecking of the train, and the consequent and natural results following, of injury and death to the passengers, is its prime purpose. . . . Hence we say that every part and clause of the act is directed toward the suppression of train wrecking."

It is further claimed that to charge the defendant with unlawfully boarding a passenger train with intent to rob the same does not charge a public offense, for the reason that the phrase "robbing a passenger train" is meaningless and implies a legal impossibility. The court had occasion to advert to the crudeness of this provision of the act in the case of *People v. Thompson*, 111 Cal. 246. It certainly was the creation of an amateurish legislative hand, yet at the same time courts are required to sustain it if possible. The act in this particular must not be nullified by the courts, if any other course in legal reason can be pursued, and we deem its weaknesses not so bad as to absolutely condemn it. As already suggested, it is aimed at the prevention of train wrecking, and, such being the purpose of the act, it may be said that a person is guilty of the offense charged by this information when he unlawfully boards a passenger train with the intention to take by force and intimidation, the control

and management thereof from the employees, and thereupon to commit larceny or robbery thereon.

In this case the prosecution relied upon a conspiracy between Britt, McCall, Haynes, Ardell, and defendant Lovren. The evidence is amply sufficient to establish such conspiracy. That being the fact, all statements, acts, and declarations made by either of the parties pending the commission of the crime, looking toward its consummation, are competent evidence against each and every conspirator.

During the progress of the trial it became important to determine whether or not two certain pieces of cloth were of the same texture and quality. Expert evidence was introduced upon this question, and we think properly introduced. It was a matter upon which the ordinary juror, if left to his own knowledge, would be very unlikely to form a correct judgment. Persons experienced in dealing in and handling such cloths would be more competent to pass upon the issue presented. It was a matter not coming within the common knowledge and common experience of men, and for that reason witnesses with special experience and special knowledge might well be called upon to give the jurors the benefit of that knowledge and experience in the form of expert evidence.

It is claimed that the conspiracy disclosed by the evidence in this case was one to "rob" the northbound passenger train, and that Lovren, the defendant, not being a present, active participant in the attempt to rob the southbound passenger train, the conspiracy goes for naught, and therefore the evidence fails to establish that he was an accessory to the attempt made. The southbound train was the one boarded, and upon which the attempt to rob was made. We are not prepared to say that the change in the plans of the other conspirators at the last moment as to the particular train which should be boarded and robbed, without the knowledge of such change coming to the defendant, would demand his acquittal. It would certainly be a very small technicality upon which to defeat substantial justice. It may be said that the conspiracy was full ripe before any particular train was agreed upon as the subject of the attack; and the particular train agreed upon by the conspirators, in the eyes of the law, was no more than an atom in the conspiracy. But, aside

from this view of the question, McCall, who was killed in the attempt, told Britt upon the afternoon of the attack that defendant, Lovren, said there would be more money upon the southbound train than upon the northbound train that night. And at the time this statement was made it was clearly the intention of McCall to make the attack upon the southbound train.

The court has examined with care the remaining grounds upon which appellant relies for a new trial of his case. There are many of them, but, after a consideration of them all none are deemed to demand a reversal of the judgment.

For the foregoing reasons the judgment and order are affirmed.

Van Fleet, J., and Harrison, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion thereon on the 23d of December, 1897:

BEATTY, C. J.—I dissent from the order denying a rehearing of this case, because I think the superior court erred in a manner extremely prejudicial to the defendant in admitting over his objection hearsay evidence tending to connect him with the conspiracy. The evidence of Britt and Haynes clearly established the fact that they had entered into a conspiracy with McCall to commit the robbery. Haynes alone gave direct evidence that the defendant had afterward acceded to the conspiracy. But he and Britt were both allowed, against the objection that it was hearsay, to testify to declarations of McCall to the effect that Lovren was aiding and assisting them. The evidence was clearly incompetent. The declarations of a conspirator that someone else is also a conspirator do not come within the rule that one conspirator is bound by acts and declarations of his co-conspirator in furtherance of the objects of the conspiracy. The fact that one is a conspirator must be proved by competent evidence; and hearsay declarations of others are not competent evidence.

[S. F. No. 819. Department Two.—November 23, 1897.]

T. CARY FRIEDLANDER, Administrator, etc., Appellant, v.
BANK OF CALIFORNIA, Respondent.

TRUST—SALE OF LANDS FOR INDEBTEDNESS TO BANK—JOINT DEBTORS—SEPARATE SETTLEMENTS—RELEASE OF ONE DEBTOR EXCEPT AS TO LANDS—SETTLEMENT WITH CODEBTOR—SURRENDER OF NOTES—ACTION BY ADMINISTRATOR FOR ACCOUNTING AS TO LANDS.—Where each of two debtors gave his notes to a bank with the other as indorser, and transferred lands and other securities to the bank to secure his indebtedness, upon an express trust to sell the lands to pay the indebtedness, and the bank, for a valuable consideration, surrendered his personal securities to one of the debtors, and released him from liability upon the notes except as to the lands transferred by him to the bank in trust, the settlement in no way touching upon or affecting the rights and liabilities of his codebtor, with whom a separate settlement was subsequently had, involving an absolute conveyance of his lands to the bank, and a release of his indebtedness, and surrender of all the notes to him, such settlement in no way touching upon or referring to the other debtor with whom the first settlement was made, the burden of indebtedness remaining upon the lands under the first settlement was not removed or discharged or in any way affected by the second settlement with the codebtor, and such lands, being still held upon the original trust, formed no part of the estate of the deceased trustor, and upon subsequent sale thereof by the bank and application of the proceeds in part payment of the original indebtedness of the deceased trustor to the bank, his administrator cannot maintain an action against the bank for an accounting upon the theory that the entire indebtedness of both debtors was discharged by the surrender of the notes, and that the lands of the deceased debtor were thereby released from the trust, and reverted to the estate.

ID.—CONFLICTING EVIDENCE AS TO NATURE OF SECOND SETTLEMENT—ADMISSION OF BANK—CLOSING OF NOTE ACCOUNT—FINDINGS—SUFFICIENCY OF EVIDENCE.—Where there is evidence of circumstances tending to show that the second separate settlement was simply a release of the liability of the debtor with whom it was made, and that the other debtor who had been before released except as to his lands was a stranger to the second transaction, and that it had nothing to do with the charge of his indebtedness upon his lands, or any release thereof, the fact that the bank, in an answer filed in another action, admitted that the entire indebtedness of both debtors was satisfied and discharged by the deed given at the second settlement, and the further fact that all the notes were given up at the time of that settlement, and the note account upon the books was then balanced and closed, cannot be held conclusive that the liability of the other debtor charged upon his lands was then discharged, but served only to create a conflict of evidence, the weight of which was matter for the trial court, and its findings against such discharge will not be disturbed for want of evidence to sustain them.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. Charles W. Slack, Judge.

The facts are stated in the opinion of the court.

L. D. McKissick, and T. M. Osment, for Appellant.

The settlement with Chapman and his conveyance was an accord and satisfaction of the whole indebtedness, and extinguished the debt as to both debtors, and ended the trust. (*Ransom v. Farish*, 4 Cal. 386; *Strang v. Holmes*, 7 Cow. 224; *Selden v. Vermilya*, 3 N. Y. 525; Civ. Code, secs. 1474, 1521-24; *Chapman v. Bank of California*, 97 Cal. 155.) It is not necessary that the consideration of an accord and satisfaction should be adequate. (*Gavin v. Annan*, 2 Cal. 494; *Sebree v. Tripp*, 15 Mees. & W. 23; *Warren v. Skinner*, 20 Conn. 559; *Ogborn v. Hoffman*, 52 Ind. 439; *Very v. Levy*, 13 How. 345; *Kellogg v. Richards*, 14 Wend. 116.) The surrender of all the notes to Chapman, and the averment in the answer in his suit against the bank that "all said indebtedness was canceled, released, and discharged," and that the "declaration of trust was thereby terminated and canceled," are *prima facie* proof of the extinction of the debt and of the trust, and are conclusive in the absence of satisfactory explanation. (*Harrison v. Peabody*, 34 Cal. 180; *Geary v. Simmons*, 39 Cal. 232; *Kidder v. Stevens*, 60 Cal. 419; *Kamm v. Bank of California*, 74 Cal. 191.)

James M. Allen, and Eugene R. Garber, for Respondents.

The bank was an express trustee of the lands conveyed by Friedlander for the purposes specified in the declaration. (*Vance v. Lincoln*, 38 Cal. 586; *Adams v. Lombard*, 80 Cal. 426; 2 Perry on Trusts, sec. 602, et seq.) The fact that Chapman purchased a release of his liability as surety on Friedlander's notes did not discharge the principal or affect the trust as to Friedlander. (*Burson v. Kincaid*, 3 Penr. & W. 57; *Mortland v. Himes*, 8 Pa. St. 265; *Bridges v. Phillips*, 17 Tex. 128; *McIlhenny Co. v. Blum*, 68 Tex. 197.) The sales of Friedlander's lands were made according to the trust, and in pursuance of agreement with him that the trust should continue as to the lands.

GAROUTTE, J.—Friedlander owed the Bank of California about five hundred thousand dollars, and Chapman owed the bank about two hundred thousand dollars. Each gave his notes to the bank for the amount of his indebtedness, with the other as an indorser. To secure the payment of all these notes Chapman conveyed to the bank about seventy-four thousand acres of land and certain collateral securities. Friedlander conveyed to the bank as security for the notes twenty-four thousand eight hundred and eighty acres of land, and also certain collaterals. These transfers to the bank were made upon an express trust to the effect that the bank should sell the land and apply the proceeds to the payment of this indebtedness. Some months after these transactions Friedlander's financial affairs became desperately involved, and thereupon another agreement was made. By this agreement, for valuable considerations received, the bank returned to Friedlander all his personal securities, and released and discharged him from any liability upon the aforesaid notes other than as to the lands transferred by him to the bank under the original trust contract made at the time the notes were given. This agreement in no way touched upon or affected the rights and liabilities of Chapman. Thereafter, the bank, without objection, entered into the possession of these lands, but the trust at that time had in no part been executed. Subsequently, Friedlander died, and prior to the commencement of the present action the land conveyed to the bank by him in no way entered into the administration of his estate. In August, 1879, about three years after these notes were given, none of the lands held by the bank under the aforesaid trust having been sold, Chapman made overtures to the bank to be released from his indebtedness. These overtures resulted in an absolute deed from him to the bank of the land originally conveyed by him as security. This deed was accompanied by a surrender to him, upon the part of the bank, of all the notes given by him and Friedlander under the original transaction. By this absolute deed of Chapman's lands and the delivery of all these notes by the bank to him, it is claimed upon the part of the Friedlander estate that the entire seven hundred thousand dollars of indebtedness was paid and discharged, and that thereby Friedlander's lands became released from the trust and re-

verted to the estate. It is upon this theory that the estate, by its administrator, brought the present action for an accounting, the land having been sold in the meantime by the bank. Upon the other side, the bank insists that by the transfer of Chapman's land to it, and a delivery of the notes to Chapman, he alone was released and discharged of liability upon the notes, and that Friedlander's land is still held subject to the original trust. Whether Chapman's indebtedness alone to the bank was discharged by his transaction, whereby the bank took title in fee to Chapman's lands, or whether the liabilities of both Chapman and Friedlander upon the notes were discharged by the transaction, is the question in this case.

As to the nature and character of the transaction entered into between Chapman and the bank in August, 1879, the court made findings of fact. By these findings it is declared that Chapman did not satisfy or discharge the indebtedness of Friedlander to the bank, or any part of it, and that no part of the indebtedness of Friedlander to the bank, or any portion of the promissory notes to Friedlander, were canceled, released, or discharged, and that the indebtedness of Friedlander evidenced by said notes had never been paid. The court further declared that by the transaction of August, 1879, the Bank of California released Chapman from personal liability upon all the notes made by him and Friedlander, and returned said notes to Chapman for that purpose only. These findings of fact are square to the point at issue, and, if supported by the evidence, plaintiff has no case. It may be further suggested that there is no direct conflict in the evidence. It also appears that Chapman was not a witness.

The case revolves around the deal entered into and consummated between the bank and Chapman in August, 1879. At that time Friedlander's land was held by the bank under the trust to satisfy this seven hundred thousand dollars of indebtedness. Did this deal release it from the heavy burdens then resting upon it? The contract between the bank and Chapman is an ordinary contract. There is nothing in it to take it out of the general rules pertaining to the construction of contracts. Such being the fact, the question presents itself, What were these two parties trying to do? What was their intention in entering into

this contract? By a mistake as to the law, contracts often cover more ground and have a different effect than the actual intention of the parties compassed in making them. But this is no such case, and the intention of these parties, as evidenced by what was said and done at the time, determines the particular result accomplished. No writing was entered into at the time between these parties indicating the scope and purpose of the transaction, and hence it is to be judged alone by the things done. There is no question but that this transaction could have occurred exactly as it did occur, and Friedlander's liability to the bank still be kept alive. Apt words would have done it, for the parties had the power and the right to do it. In other words, if the transaction between Chapman and the bank was one looking solely to the release of Chapman from this vast indebtedness, then such purpose only was accomplished. If the contract of the parties was one looking toward the lifting of burdens from Chapman's shoulders solely, then certainly the burdens of other people were not affected by it; and burdens resting upon Friedlander prior to the transaction would rest upon him the same subsequent thereto. At the incipency of the transaction this burden of indebtedness rested upon Friedlander's land, and, if it was not in the minds of the parties as an element entering into the making of the contract, it still rested upon the land thereafter.

Friedlander was a stranger to the transaction between Chapman and the bank. His name was never mentioned; his indebtedness was never mentioned. The contract was the result of a letter written by Chapman to the bank, wherein Chapman asked the privilege of giving to the bank a deed in fee of all his land held by it as security, in exchange for a release and discharge to him of his indebtedness to the bank upon these notes. He stated in the letter that this indebtedness was crushing him, and that if he could not be freed from it he would have to give up the struggle. It thus will be observed that Chapman was looking after his own interests entirely. He had ample troubles of his own, and Friedlander's indebtedness was in no way occupying his attention. By the proposition submitted to the bank he offered to give all his land for his own discharge. He did not ask for Friedlander's discharge. It certainly would be out

of the ordinary course in which banks do business if this bank voluntarily and without consideration of any kind released Friedlander's land from liability. Yet this must be appellant's contention. Upon the heels of this letter a meeting of the parties was had. Chapman gave to the bank an absolute deed of his land, and the notes evidencing the entire indebtedness were delivered to him. A director in the bank, who participated in the transaction, testified: "The bank finally released him from his debts and his obligations, and took the acres of land which he had given as security. The negotiations had nothing to do with Friedlander." The cashier of the bank testified: "After this letter was received the matter was submitted and discussed, and finally we agreed to accept the lands and release Mr. Chapman from the indebtedness. I do not remember of Friedlander's name being mentioned in connection with the final release of Mr. Chapman." If this evidence be taken as true, then certainly no accord and satisfaction of Friedlander's debts took place, but the contract was simply a release of Chapman from liability upon the notes. It is insisted by appellant that these circumstances, which tend to show simply a release of Chapman's liability, are completely overthrown and nullified by other evidence. The principal evidence relied upon for this purpose consists of an allegation found in an answer filed by defendant in another action, to the effect that the indebtedness of both Chapman and Friedlander was satisfied and discharged by Chapman's deed; and the further fact that all the notes were given up to Chapman by the bank, and the note account upon the books balanced and closed. Certainly, the more orderly and better practice would have been for the bank to have issued a release to Chapman, and retained to itself the notes. But a reason was given by the cashier for the practice; and the sufficiency of this reason and the weight to be given the allegations of the pleading were matters very largely addressed to the trial court, and we are bound to assume that they were there given due consideration. This evidence certainly tended to support the theory of the plaintiff as to the nature of the transaction actually occurring between the parties. It tended to overthrow the theory of the defendant as to the character of the transaction, and to overthrow the evidence upon which it relied to support that theory; but in no

sense could it be held conclusive to that point. The weight of it was a matter for the trial court, and that court, as indicated by its findings deemed it too light to support plaintiff's claims, when placed in the balances with evidence looking to an opposite conclusion. In other words, it served but to create a conflict of evidence; and we deem there is ample evidence to support the findings of the court upon the matters to which we have been addressing ourselves.

The remaining points made by appellant are of minor importance, and demand no extended consideration.

For the foregoing reasons the order denying a new trial is affirmed.

McFarland, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

[L. A. No. 238. Department One.—November 24, 1897.]

M. HERZOG, Appellant, v. J. S. PURDY, Respondent.

SALE—SEVERABLE CONTRACT—DIFFERENT ITEMS—ACCEPTANCE.—A contract for the sale of different kinds of personal property, at an agreed price for the different items, is severable, in the absence of any thing in the contract to show that the sale of one item was contingent upon the sale of the others, or that the contract was for any other reason an entirety; and the refusal of the purchaser to accept a tender of one of the items does not operate to waive or excuse performance or offer of performance, by the seller as to the other items.

ID.—RELEASE BY SELLER—PERFORMANCE.—Upon the refusal of the purchaser to accept a tender as to one of the items, a resale by the seller of all the property incapacitates him from any performance whatever, and releases the purchaser from the necessity of further demand or tender of performance as to the other items, and as to them subjects the seller to liability.

ID.—PART PAYMENT—FORFEITURE.—Where, at the time of the execution of such contract, the buyer made a payment which the seller receipted for "on account," the subsequent refusal of the buyer to accept one of the items does not work a forfeiture of the payment, but it is his right to have it applied on the price of any of the items which he accepted.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order refusing a new trial. John L. Campbell, Judge.

The facts are stated in the opinion.

Paris & Allen, for Appellant.

Eggers & Allen, for Respondent.

BRITT, C.—On April 11, 1895, the parties entered into a contract whereby plaintiff agreed to buy and defendant agreed to sell certain salt hides, calfskins, pelts, and tallow of animals previously slaughtered, and thereafter, during said month of April, to be slaughtered by defendant in the course of his business of butcher. Plaintiff then paid to defendant the sum of two hundred dollars, and took the following receipt: "Received from M. Herzog two hundred dollars on account. All hides and pelts, April killing, to be delivered on or about May 1, 1895. J. S. Purdy." By the terms of the contract the hides were to be paid for at four and one-eighth cents per pound; calfskins at thirty-five cents each; pelts (of sheep, it seems) at four cents per pound; tallow at three and one-eighth cents per pound. This is an action for damages for alleged breach of the contract by defendant in failing to deliver the goods. Verdict and judgment were for defendant.

At the trial there was evidence that defendant carried on his business at the town of San Bernardino, where the contract was made; that plaintiff resided elsewhere, and that, to obviate the necessity of plaintiff's coming again to San Bernardino, it was agreed that one Rittler should in his behalf receive, pay for, and ship the goods. On April 28th, defendant notified Rittler that the hides would be ready for delivery at 9 o'clock in the forenoon of April 30th, and accordingly the latter attended at defendant's slaughterhouse at the time appointed. The evidence was quite conflicting as to what occurred there; the testimony for defendant tended to show that Rittler objected to the condition of the salted hides and said he could not receive them, but would telegraph Herzog, the plaintiff, to come at once himself; also, that Rittler's objections to the hides were not well founded. Defendant said to him: "Herzog appointed you his agent to receive these hides and they are shrinking every day they are here, and you have to take them now or I will sell them to somebody else." Rittler refused. Both he and defendant

forthwith sent telegraphic messages—Rittler summoning Herzog, defendant notifying a buyer of such commodities at Los Angeles that his hides were for sale. On the morning of May 1st the latter arrived, and defendant sold the hides to him; he sold also, to the same party it seems, the other property he had previously bargained to plaintiff. Herzog arrived in San Bernardino in the afternoon of May 1st, and, being unable to find the defendant, announced at his shop that he was ready to receive the goods he had bought; on May 2d he repeated the offer to defendant personally, and was informed that they had been sold. There was evidence tending to show that on April 30th defendant had on hand within the purview of the contract eight thousand five hundred and thirty-four pounds of salted hides, five thousand four hundred and eighty-four pounds of tallow, and a considerable number of pelts and calfskins. On said April 30th the market price of hides had advanced materially since April 11th, the date of the contract of sale. Defendant retained the payment of two hundred dollars he had received, claiming that it was forfeited to him.

Admitting that Rittler's conduct might rightly be treated by the defendant as a positive and final refusal of such of the goods as the defendant offered to deliver—and that it was not rather an attempt to defer acceptance until, within the period fixed for delivery, Herzog might exercise his personal judgment in the matter—still the evidence in the record fails to sustain the verdict. It has been seen that the prices to be paid by plaintiff were expressly apportioned to the several items of the property, so much per pound for hides, so much for tallow, etc; such a contract of sale the law regards in general as severable, and we discover no evidence here to take the case out of the rule—nothing to show that the sale of one item was contingent upon the sale of the others, or that the contract was for other reason an entirety. (*Norris v. Harris*, 15 Cal. 256, 257; *More v. Bonnet*, 40 Cal. 251; 6 Am. Rep. 621; 2 Parsons on Contracts, 8th ed., 633-37.) Now, the whole transaction between Rittler and defendant on April 30th had reference to salt hides only; there is no evidence that defendant ever offered or proposed to deliver any part of the property he had bargained to plaintiff except such hides. Counsel invoke for defendant's excuse in

this behalf section 2076 of the Code of Civil Procedure. That section requires the person to whom a tender is made to specify at the time any objection he has to the amount or kind of property tendered, or be precluded from objecting afterward. But while the ground stated by Rittler may have been a waiver of other objections for defect of quality or quantity of the salt hides, it could not operate to waive performance, or offer of performance, of other and independent provisions of defendant's agreement. Suppose Rittler had accepted, paid for, and taken away the salt hides—nothing being said as to the tallow, etc.—thus giving the fullest possible effect to the defendant's tender, this procedure would certainly have been neither fulfillment nor waiver of the agreement for the purchase and sale of the other articles undelivered. We are also referred to the provision of section 1511 of the Civil Code, that the want of an offer of performance is excused when the debtor is induced not to make it by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such offer may be made and not rescinded before that time. But, in a case like the present at least, the conduct relied on as a waiver of tender should be tantamount to an explicit and positive refusal to receive (*Hansen v. Slaven*, 98 Cal. 377, 382); and the contract being severable, it is impossible that the refusal of the salt hides could be a refusal of the other things; the rejection of the former was no renunciation of the right to receive the latter. (*Morgan v. McKee*, 77 Pa. St. 228; *Young etc. Mfg. Co. v. Wakefield*, 121 Mass. 91.)

The whole case tends to show that defendant was ready and willing, prompt and eager, not to perform the contract on his own part, but to take advantage of a slip of the plaintiff, and avoid performance. Having chosen to proceed himself as the actor, and to resell all the property and convert the money paid by plaintiff, the defendant was as much bound to first offer performance of all the concurrent conditions imposed on him by the contract as if he had prepared to bring an action thereon. Proceeding without this precaution, and having incapacitated himself by resale of all the goods from any performance whatever, he released the plaintiff from the necessity of further demand or tender (Benjamin on Sales, sec. 567), and became liable to

plaintiff in this action. He would have the right to counterclaim for damages he sustained from the wrongful refusal of plaintiff to accept the salt hides, if such he could prove; but since it appears that he sold those for a sum considerably greater than the price plaintiff agreed to pay, the question of plaintiff's default in that particular can hardly arise on a new trial, except as matter purely defensive against the plaintiff's claim for damage as to that item.

The court instructed the jury: "That if plaintiff and defendant entered into a contract for the purchase and sale of specific personal property, and the plaintiff thereafter refused to accept the goods, or property, and so informed the defendant, defendant had a right to regard said contract abandoned by plaintiff; and if plaintiff, at the making said contract, made a payment in money to defendant as forfeit money to bind the bargain and to act in good faith with defendant, then, and in that event, defendant could retain said money." The instruction was erroneous as applied to the facts, in that it ignored the severable character of the contract, and in that it confounded matters which have no necessary identity, viz., money paid as a forfeit, and money paid to bind a bargain, that is "earnest money." (*Howe v. Hayward*, 108 Mass. 54; 11 Am. Rep. 306.) If the money was deposited as a forfeit (though the evidence to support this view was very slight) then the condition thereof never occurred, for the defendant has not done "everything he was bound to do to entitle him to insist on the forfeiture." (*Carpenter v. Blandford*, 8 Barn. & C. 575.) If, as seems more probable, the payment was by way of earnest and to bind the bargain, then it was part payment of the contract price, and it was plaintiff's right to have it applied on the price of any of the goods which he might have accepted. We do not at all controvert the rule that a buyer who wrongfully abandons his contract cannot recover payments he has made on account, but the present record discloses no case for its application. The judgment and order denying a new trial should be reversed.

Searls, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

Van Fleet, J., Garoutte, J., Harrison, J.

[L. A. No. 250. Department One.—November 24, 1897.]

J. H. CARTER, Respondent, v. L. R. TILGHMAN, Appellant.

IRRIGATION DISTRICT—WRIGHT ACT—SPECIAL TAX — SEGREGATION INTO SEPARATE FUNDS.—Under the provisions of the Wright act, a lump sum of money raised by an irrigation district by a special tax, in pursuance of an authorization given by the qualified electors, which directed it to be raised for certain specified purposes, is all equally applicable to the payment of indebtedness incurred for any of such purposes, and the directors of the district have no power to segregate it into several funds corresponding to the purposes specified, so as to limit the right of payment of a legitimate indebtedness to the amount by them directed to be placed to the credit of the particular fund.

ID.—FORM OF WARRANT.—The fact that a warrant issued by the district for a legitimate indebtedness incurred for one of such purposes, contained a direction that the amount paid thereon should be charged against a particular fund, did not limit the right of the holder to payment from any funds in the hands of the treasurer applicable thereto.

ID.—INDEBTEDNESS INCURRED PRIOR TO TAX.—It is no objection to the payment of the warrant that it was issued prior to the time when the particular money was raised by such special tax.

APPEAL from a judgment of the Superior Court of Los Angeles County. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

Mulford & Pollard, for Appellant.

Edwin A. Meserve, for Respondent.

GAROUTTE, J.—This is an appeal from a judgment of mandate which ordered the treasurer of Big Rock Creek Irrigation District to pay certain warrants, issued by the district, from the funds then in the treasurer's hands. Under authority found in certain provisions of the Wright irrigation act, four thousand dollars was raised by a special tax upon the property of Big Rock Creek Irrigation District. This tax was directly authorized by the qualified electors of the district, and was raised for the purpose of "the payment of salaries of officers and agents of the district, repairs, maintenance and protection of the ditches and other property and rights of the district." Subsequently, the board of directors met and apportioned this four thousand dol-

lars to certain specific funds, to wit, one thousand dollars to the "expense fund," one thousand dollars to the "litigation fund," and two thousand dollars to a fund then and there created to be known as the "engineer's fund." The various warrants of the district here involved, in all substantial parts, may be said to be in the following form:

"Treasurer Big Rock Creek Irrigation District will pay to George S. Martin, the sum of thirteen dollars for labor accrued November 1, A. D. 1893, and charge to expense fund.

"Attest:

JAMES McCOY, President.

"L. C. TILGHMAN, Secretary.

"This indebtedness is payable only when there are funds in the hands of the treasurer applicable therefor."

Some of these warrants were issued prior to the voting of the aforesaid tax.

There were no funds in the hands of the defendant treasurer to the credit of the "expense fund" at the time these proceedings were inaugurated, and for that reason appellant insists that he, as treasurer of the district, could not pay the warrants, and therefore the action must fail. It is also insisted that the warrants were made payable out of a particular fund; that the holders thereof, by accepting the warrants, agreed to look to that fund alone for payment, and the fund being exhausted, they had no remedy. If it be conceded that the legal consequences contended for by appellant follow from the existence of the facts above stated, still petitioner's cause of action is not defeated, for the facts are not as claimed by him. There is no agreement upon the part of the holder of a warrant that he will look to the "expense fund" for the payment of the warrant. The fact that the amount paid upon the warrant is to be charged up to the "expense fund" in no way indicates it. Such course of action would be a mere matter of bookkeeping. Upon the contrary, the warrant expressly states upon its face that any funds in the hands of the treasurer applicable to its payment may be called upon to satisfy it. The question then presents itself: Are there any funds in the hands of the treasurer which may be applied to the payment of these warrants?

There is money in the hands of the treasurer set aside from the proceeds of the aforesaid tax in the "engineer's fund" and in

the "litigation fund." May these moneys be applied to the payment of the warrants forming the basis of this litigation? We are entirely satisfied that such an application may be made of them. As against the holder of warrants the board of directors had no power to indulge in a game of hide and seek with the funds of the district, and certainly not with the funds raised by a vote of the people for certain particular purposes. As a matter of bookkeeping, the board may keep as many accounts or funds as deemed necessary or convenient, but such a system of bookkeeping in no way affects the rights of creditors. If legal justification exists for the application of this four thousand dollars as it was applied, then the entire amount may have been applied and set apart to the "engineer's fund," or some other fund upon which there was no demand whatever, and possibly never would be, and thus the very purposes for which the money was voted by the people be entirely defeated. This tax was voted by the electors of the district for certain specific purposes. When collected it was a fund of itself applicable to the payment of indebtedness incurred for those purposes, and the board of directors had no power to divert it into other channels. Neither could it divert to the payment of certain kinds of indebtedness within legitimate channels, as against other indebtedness standing upon the same plane and equally within the purposes for which the tax was raised. The board must be entirely impartial in the application of the money raised by this tax, and, as warrants are presented for indebtedness incurred for any of the purposes authorized by the act and specified in the call for the election, those warrants should be paid regardless of the status of any particular fund to which these moneys may have been set aside by the board of directors. The entire amount raised by the tax is a common fund to meet all such indebtedness.

The fact that some of these warrants had been issued prior to the time when this particular money was raised by the tax we deem immaterial. We find no reason in the law why any distinction should be made in this regard.

For the foregoing reasons the judgment is affirmed.

Van Fleet, J., and Harrison, J., concurred.

[S. F. No. 649. Department One.—November 24, 1897.]

N. G. YOUNG, Respondent, v. ENGELBERT FINK, Appellant.

PRACTICE—JUDGMENT BY DEFAULT — MOTION TO SET ASIDE—FRAUD.—

Under section 473 of the Code of Civil Procedure, a judgment regular on its face, against a defendant who had been personally served with the summons and the original complaint, and entered upon his default in not answering an amended complaint which had been properly served upon his attorney of record, cannot be set aside on motion, on the ground of the alleged fraud of the attorney for the plaintiff in not serving the amended complaint personally on the defendant, in pursuance of a verbal agreement to that effect, after the expiration of six months from the entry of the judgment.

APPEAL from an order of the Superior Court of the City and County of San Francisco setting aside a judgment and recalling an execution. Charles W. Slack, Judge.

The facts are stated in the opinion.

F. A. Rossi, and A. Ruef, for Appellant.

William J. McGee, for Respondent.

CHIPMAN, C.—Appeal from an order setting aside and vacating a default judgment rendered against defendant, and recalling an execution issued thereon.

The grounds of the motion on which the order was made were mistake, inadvertence, and excusable neglect in not answering plaintiff's amended complaint; that the amended complaint changed the cause of action, and was not personally served on defendant, and on the further ground that the judgment was procured by fraud and without notice to defendant. It is not questioned by respondent that the judgment is regular on its face.

Appellant contends that the motion came too late, and ought not to have been granted on any of the grounds stated. It was filed six months and eleven days after judgment was entered.

1. Respondent concedes appellant's point as to the motion being too late on the grounds of defendant's mistake, inadvertence, or excusable neglect, under section 473 of the Code of Civil Procedure, but he contends that another provision of that section covers the case, to wit: "When, from any cause, the summons in an action has not been personally served on the defend-

ant, the court may allow such defendant at any time within one year after the rendition of the judgment in such action, to answer to the merits of the original action." The summons was duly served in the original action; but it is insisted that the judgment was rendered on an amended complaint which it is claimed set up a new cause of action, and, because it was not served personally upon the defendant, respondent is entitled to take advantage of the provision of the code just quoted. It is claimed by respondent, but is denied by appellant, that the attorney of record had ceased to be the attorney of respondent prior to the service upon this attorney of the amended complaint. He had appeared in the case and had filed a demurrer, and had caused the action to be transferred to the county where judgment was entered, and there had been no substitution of any other attorney nor any withdrawal of his appearance entered of record. It was claimed, however, that appellant's attorney had been told by respondent's attorney, although not notified in writing, that the latter no longer represented respondent, and that he would not accept service of the amended complaint, and the attorney for respondent deposed that appellant's attorney promised to serve his amended complaint upon respondent, and this, too, is denied under oath by appellant's attorney.

Appellant's attorney, however, did serve the amended complaint upon respondent's attorney by leaving a copy thereof in his office, and it was received by him and due return of the service was made, on which the default was entered, but appellant's attorney did not personally serve it upon respondent. It is this action of appellant's attorney that constitutes the *gravamen* of the charge of fraud.

Whatever may be the truth as to the allegation of respondent in this particular, we think the amended complaint was entitled to be filed as of course, being the first amendment, there having been no trial on the issue of law. (Code Civ. Proc., sec. 472.) And it was properly served upon the attorney of record. (Code Civ. Proc., secs. 285, 1011, 1015.) The alleged fraud is a matter which cannot be considered in construing the provisions of the code relied upon by respondent. There was no such amendment as required a summons to issue, and, as the summons to the action was in fact personally served, the clause re-

ferred to does not apply. It was intended, we think, to apply to cases where service is by publication, and may possibly apply where the personal service of the summons was of such character as to be equivalent to no service at all.

2. Respondent claims that the court had authority to grant the motion on the ground of fraud, independent of section 473, and cites numerous authorities in support of his contention. They have had careful examination, but they do not conflict with other decisions of this court adverse to respondent's position. They are mainly cases where the judgment showed on its face that it was void for want of jurisdiction or other cause, and where relief was sought by bill in equity. In such cases it is held, as was said in *Wharton v. Harlan*, 68 Cal. 422: "We are not aware that it had been held that a void judgment, entered on default by the clerk, must be attacked by motion within six months. . . . We are convinced that the court may at any time set aside a judgment by default by the clerk when it appears from the roll that the clerk had no power to enter it." We think that this is the distinguishing point of difference in the cases cited and the case before us. It was further said in the case referred to: "There is reason for sending a defendant into a court of equity which does not apply when the judgment is void for defects appearing in the roll (Code Civ. Proc., sec. 670, subd. 1), and which thus bears on its face the evidence of invalidity."

It was therefore held in *Wharton v. Harlan*, *supra*, that "by the terms of section 473 the motion must be made within six months, even though the mistake, inadvertence, surprise, or excusable neglect has been caused or brought about by fraud practiced by the party in whose favor the judgment or proceeding was taken. After that period the question of mistake, etc. (whatever the remedy in equity), cannot be tried by affidavit."

In *Dyerville Mfg. Co. v. Heller*, 102 Cal. 615, the grounds upon which the application was made were excusable neglect and fraud practiced upon the court by plaintiff's former counsel by procuring the judgment to be given in excess of the stipulation. It was claimed that, as the judgment was procured by fraud, the provisions of section 473 do not apply. But the court held that this point was expressly decided against respondent's claim in

the case of *Wharton v. Harlan*, *supra*. (See, also, *People v. Temple*, 103 Cal. 447; *People v. Harrison*, 84 Cal. 607; 107 Cal. 541.) In *People v. Temple*, *supra*, it was said: "What is a reasonable time within which a motion may be made to set aside a judgment not void upon its face must depend somewhat upon the circumstances of each particular case, and is not definitely determined further than that it will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure."

In the case before us, the application was undoubtedly made under section 473, but that fact alone should not deprive respondent of his relief outside this section, if the showing entitles him to it. We think, however, the rule is, and should be, that where the judgment does not show on its face that it is void, and the motion is not made under and within the time prescribed by that section, the party should be remitted to his equitable action. We have in the case at bar an example of a judgment regular on its face, with no question as to the jurisdiction of the court to make it. The motion to set it aside was not made within the time prescribed by any statute. It was a motion that would have been good if it had been made within the time and had been supported by the facts. We think it was error to grant the relief on motion. (*Moore v. Superior Court*, 86 Cal. 495, and cases there cited; *Jacks v. Baldez*, 97 Cal. 91.)

3. The motion to dismiss the appeal has already been denied, and, although argued in respondent's brief, we cannot reconsider the order heretofore made. Respondent made default, and no motion has been made to reopen the default nor for a rehearing of the motion.

The order vacating the judgment and recalling the execution should be reversed.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the order vacating the judgment and recalling the execution is reversed.

Garoutte, J., Van Fleet, J., Harrison, J.

[Sac. No. 270. Department Two.—November 26, 1897.]

GEORGE RUPERT, Respondent, v. EDWARD JONES et al.,
Appellants.

QUIETING TITLE—EXECUTION SALE OF POSSESSORY RIGHT—TITLE ACQUIRED BY PRE-EMPTOR NOT AFFECTED.—A sale under execution against a pre-emptor, who had obtained a government patent for the land prior to the sale, which did not purport to convey his title in fee, but was merely of "all the right, title, and interest" held by him on the date of the filing of an abstract of a judgment recovered against him in a justice's court, upon which the execution was issued, at which date the pre-emption settler had only a possessory claim to the land as such settler, and had not proved up or paid for the land, did not pass or affect the title acquired by him subsequently to that date, and he may maintain an action to quiet his title in fee against the purchasers at the execution sale.

APPEAL from a judgment of the Superior Court of Fresno County. J. R. Webb, Judge.

The facts are stated in the opinion.

John E. F. Edwards, and M. K. Harris, for Appellants.

George L. Hood, and G. G. Goucher, for Respondent.

BELCHER, C.—This is an action to quiet the plaintiff's title to a quarter section of land in the county of Fresno. The plaintiff had judgment, and the defendants appeal therefrom on the judgment-roll, without any statement or bills of exceptions.

The material facts of the case, as found by the court, are in substance as follows: In April, 1891, plaintiff entered into possession of the said quarter section of land, and on November 22, 1891, made final proof thereon in the United States land office at Visalia, county of Tulare. On February 14, 1893, the United States government issued to the plaintiff its patent for the said land. On November 10, 1891, defendants filed in the recorder's office in the county of Fresno an abstract of a judgment recovered by them against the plaintiff in a justice's court on August 26, 1891. On August 26, 1893, an execution was issued out of the justice's court, and on October 7, 1893, "all of the right, title, and interest of George Rupert, the plaintiff, which he had on the tenth day of November, 1891, in the said land de-

scribed in the plaintiff's complaint was sold by a constable." The said constable "sold, or attempted to sell, only such right, title, and interest in the said lands as the plaintiff herein had and was possessed of on the tenth day of November, 1891, and no interest of said plaintiff subsequent to said tenth day of November, 1891, was sold by said constable, or claimed to be sold."

And as conclusions of law the court found that the plaintiff was the owner in fee of the land described in his complaint, and was entitled to a judgment quieting his title to the same as against the defendants and each of them.

It will be observed that it does not appear from the findings that the defendants were purchasers at the constable's sale or successors in interest of a purchaser, or that they ever received a constable's deed for any interest sold. But assuming that they were such purchasers, and in due time received the constable's deed, still, on the 10th of November, 1891, the plaintiff had only a possessory claim to the land as a pre-emption settler. He had not then any title to the land and did not acquire any until he proved up and paid for it. The title afterward acquired did not pass by the sale, as it is found to have been made, and was not affected by it. (*Montgomery v. Whiting*, 40 Cal. 294; *Moore v. Besse*, 43 Cal. 511; *Thrift v. Delaney*, 69 Cal. 192.)

The judgment should be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

McFarland, J., Van Fleet, J., Garoutte, J.

Hearing in Bank denied.

[Crim. No. 339. Department One.—November 29, 1897.]

THE PEOPLE, Respondent, v. JOHN TAYLOR, Appellant.

CRIMINAL LAW — PLEADING — INFORMATION FOR FELONY—ABSENCE OF CONCLUSION CONTRA FORMAM STATUTI—MOTION IN ARREST OF JUDGMENT.—The failure of an information for felony to allege that the acts which constituted the felony were done "contrary to the force and effect of the statute in such cases made and provided," no demurrer having been interposed to the information upon that ground, does not go to the jurisdiction of the court, nor disclose a failure to state a public offense, and is not ground for a motion in arrest of judgment.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a motion in arrest of judgment. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

R. B. Myers, and William H. O'Brien, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

THE COURT.—This appellant complains that his motion in arrest of judgment should have been granted. The contention is based upon an alleged defect in the information, wherein it fails to allege that the acts done by appellant which constitute the burglary were done "contrary to the force and effect of the statute in such cases made and provided."

No demurrer was interposed to the information, and under those circumstances no defect appearing upon the face of the information can be considered, unless it bears upon the matter of jurisdiction. The defect in the information here relied upon in no sense is jurisdictional, neither does it disclose a failure to state a public offense, and for these reasons the motion to arrest the judgment was properly denied.

The judgment is affirmed.

Hearing in Bank denied.

[L. A. No. 151. Department One.—November 29, 1897.]

D. F. OGLESBY et al., Respondents, v. CITY OF SANTA BARBARA et al., Appellants. JULIA G. BAKER, Respondent, v. CITY OF SANTA BARBARA et al., Appellants.

INJUNCTION—ACTION TO RESTRAIN CITY FROM GRADING LANDS OF PLAINTIFF—DISPUTE AS TO LOCATION OF STREET—PRIMA FACIE EVIDENCE—BURDEN OF PROOF—SHOWING TO WARRANT REVERSAL.—In an action to restrain a city from entering upon the lands of plaintiffs for the purpose of grading a street, where there is evidence tending to show that plaintiffs had both title and possession of the disputed strip, over which the city claimed that the street should be located and that the street as actually located and used by the public for more than twenty years, was an open street of sixty feet in width, by which plaintiff's lot was bounded, and on both sides of which lots were fenced in during that period, the burden is on the city to overcome such prima facie evidence of title in plaintiff to the disputed strip of land, by clear proof of the title of the city thereto, and such proof must be uncontradicted by plaintiff's evidence, in order to warrant reversal of a judgment for the plaintiffs.

ID.—CONFLICTING EVIDENCE—LINES OF STREET ESTABLISHED BY SURVEY—SUBSEQUENT SURVEY—FINDINGS—APPEAL.—Where the evidence is conflicting as to the true original location of the street in controversy, but there is evidence tending to show an actual survey of the street by the town surveyor, taking the admitted base and initial point of the original survey, and that the fences and improvements on both sides of the street were made in accordance with such survey, leaving the street of full width, proof of a subsequent survey by another town surveyor, showing a different location of the street, only raises a conflict of evidence, and a finding of the court as to the correctness of the prior survey, having support in the evidence cannot be disturbed upon appeal.

ID.—TWO METHODS OF SURVEY—PROVINCE OF COURT.—The court, having the facts before it as to two methods of ascertaining the lines of the street, had the right to judge as to which method of survey was the most satisfactory, and nearest in conformity with the actual original location; but it is not for the appellate court to determine that the true location of the street must in all cases be ascertained in the method approved by the trial court.

APPEAL from a judgment of the Superior Court of Santa Barbara County and from an order denying a new trial. W. B. Cope, Judge.

The facts are stated in the opinion.

Thomas McNulta, for Appellants.

Richards & Carrier, and A. A. Oglesby, for Respondents.

CHIPMAN, C.—Action to restrain defendants from entering upon block 56½, in the city of Santa Barbara, which it is alleged in the complaint defendants threaten to do for the purpose of grading Laguna street, on which said block fronts, and from excavating and removing soil from said block and removing plaintiffs' fences inclosing the same. By stipulation, the case entitled Julia G. Baker *versus* the same defendants was tried upon the same evidence as that first above mentioned, and is here by the same transcript, both to be heard and determined as governed by the same questions of law and fact. The court gave judgment for plaintiffs, and the appeals are from the judgment and from the order denying defendants' motion for new trial and upon a statement. The court found, and it is not denied, that the streets and blocks of said city, when a town, in 1851, were surveyed and platted upon a map by one Salisbury Haley, and that said survey was then adopted as the official survey and map of said city, by which plaintiff's block 56½ is bounded on the southwest by Laguna street; that plaintiffs are and were the owners when the action was commenced and seised in fee of said block, being one hundred and fifty yards square, and that they were and had been by themselves and through their predecessors for twenty years continuously in the exclusive occupation and possession of the premises as described in the complaint (the complaint describes the block by metes and bounds, commencing at a certain intersection of Micheltorena and Laguna streets and as inclosed, the inclosure taking in the disputed strip); that the premises have been inclosed since the year 1875 with a substantial fence; that Laguna street is an open street sixty feet wide, upon which said block fronts, running from Victoria street to Pedregosa street, in reference to which said Laguna street lots were fenced on both sides, and said street had been traveled by plaintiff and the public for more than twenty years, "but the city of Santa Barbara or its predecessors have not acquiesced in the location of said open street as constituting the true location of Laguna street according to the official map and survey of said city by Salisbury Haley"; that defendants threaten, and will, if not restrained, excavate from the soil and grade and appropriate a portion of plaintiffs' premises, to wit, a strip about six feet in width fronting on said street; that a number of lots abutting

on said street "have on them trees and shrubbery, residences, and other improvements, which to a great extent constitute the beauty and attractions of said throughfare"; that said strip of land and the improvements thereon are not embraced within the lines of Laguna street, as the same was dedicated to public use in 1851 by said city by the so-called Haley survey. The controversy involves the integrity of the lines of Laguna street for a long distance and the residence property of many lotowners—the disputed strip varying from six to thirteen feet wide.

1. Defendants present the case as arising on an action to quiet title, claiming the burden of proof to be upon plaintiffs to prove title in the disputed strip of land. In *Tate v. Sacramento*, 50 Cal. 242, the action was to enjoin the street commissioners from opening a certain street in the city of Sacramento. The defendant claimed that the buildings of plaintiff were in the street, and were an obstruction and a nuisance. It was there held that plaintiff's possession was *prima facie* evidence of title, and must be presumed to be rightful until the contrary appears. It was further held that it was incumbent upon defendant to show that the street upon which the alleged obstructions stood had been dedicated as a public street. It was so held also, in a similar case, in *Demartini v. San Francisco*, 107 Cal. 402, where the question was fully discussed. Under the pleadings and proofs in the present case, it was clearly the duty of defendants to show their right to the strip of land in question after plaintiffs had proven possession and right of possession, as the evidence tended to show they did and as the court found. It is claimed by defendant that *Orena v. Santa Barbara*, 91 Cal. 621, is a similar case to this, involving much the same questions, and that it was there held that "the burden was upon the plaintiff to show title in himself. He can do so only by proof that the premises are within his grant. Proof of his supposed adverse possession does not make a *prima facie* case." It is sufficient answer to defendant's contention that *Orena v. Santa Barbara, supra*, was an action to quiet title. But the court here found, and the evidence tends to prove, title in plaintiffs as well as possession, as claimed by them.

2. It is claimed by the defendants that the evidence tended to show that the boundary lines of Laguna street were estab-

lished by the Haley survey as contended by defendants, and that there was no evidence tending to show that they were established by that survey according to the lines of fences on that street, and therefore the court should have found for defendants. The evidence is quite voluminous; we do not feel called upon to present an analysis of it, for the reason that upon the point at issue there is a clear conflict. Defendants introduced evidence tending to show that by a correct survey, taking certain monuments and lines as established by the Haley survey as initial points from which to retrace the lines of Laguna street, plaintiff's fence encroached upon the street about six feet at plaintiff's block. The evidence of James L. Barker, a former town surveyor who made a survey in 1871, tends to show this. On the other hand, plaintiffs' evidence tends to show that the lines of Laguna street were established by actual survey, taking Haley's admitted base and initial point used for his map at Carrillo and State streets as the initial for the survey, and that the fences and improvements were made in accordance therewith, leaving the street the full width of sixty feet. Such a survey was made by the witness, W. H. Norway, in 1870, who was then the town surveyor. A great deal of evidence was introduced by plaintiffs to show that along Laguna street the owners of property had, ever since 1870, built their fences and houses and improved their lots with reference to this Norway survey, and that in some instances, including plaintiff's (Mrs. Baker's) lots, valuable improvements had been made on this contested strip of land, and that the public had, since 1870, treated the lines as marked by Norway. It does not seem to us necessary to consider how far the acquiescence of the public and the lotowners or the nonacquiescence of the city authorities in the Norway survey may affect the rights of the parties here. In determining the lines of the street, such considerations were deemed important and said to be sometimes conclusive in *Orena v. Santa Barbara*, *supra*. (And see, also, *Payne v. English*, 101 Cal. 14.) But here we have some evidence as to the true location of the lines based upon the Haley survey; the evidence is conflicting to be sure, but, being so, we cannot say which is right or which is wrong. The court found for the plaintiff upon the point, and

that finding, having support from the evidence, cannot be disturbed.

3. Defendants claim that the lower court decided the case on the assumption that plaintiffs' possession gave them the right, and that under the Orena case possession was a false quantity, quoting from that case the statement that "the supposed adverse possession was a false quantity in the problem to be solved." And so it was in that case, which was to quiet plaintiffs' title. The court very properly held that the public cannot be disseised of lands used as a throughfare by intrusion upon them. We are not called upon to decide whether plaintiffs' evidence would have been sufficient in an action to quiet title; but there was sufficient evidence here to show plaintiffs' right *prima facie* to the relief sought, and the court found against defendants on the fact as to whether this *prima facie* case was overcome. Nothing short of clear proof by defendants, uncontradicted by plaintiffs' evidence, that the street lines were where defendants claimed, could defeat plaintiff's action. Such proof was not forthcoming.

Norway testified as to locating the blocks as follows: "I located them with reference to measurements from the initial point at Carillo and State streets, measuring four hundred and fifty feet for a block and sixty feet for a street, with the exception of Carillo and State street, which were eighty feet." He testified that, taking the Carillo and State street point from the Haley map, it would furnish the means of locating these blocks, and that he so located them at that time (1870.)

Barker testified that in making his survey he was instructed "to take the stakes which had been reputed at that time (1871) to be Haley stakes, stakes set by Haley, and take them primarily for my guide; in the absence of them, to take old fences that had been reputed by the owners of the premises, adjacent premises, to have been located on the lines between Haley stakes, and, further, take the testimony of old residents who claimed to have information as to the original location of Haley stakes; and I followed those instructions." In following those instructions the witness testified that he found discrepancies between Haley's map and his survey. It will be readily seen that the survey of Norway and Barker might differ, and no doubt did. Apparent-

ly, however, the survey of Barker took as initials interior monuments and stakes, while Norway took the original starting point for the survey of the town and the map. The court manifestly regarded the Norway survey as the more reliable as affecting lots on Laguna street, and we cannot now say that it was error so to do. We do not wish to be understood as holding that where the Haley maps and survey may be drawn in question as they may affect any particular street or block, that the true location must in all cases be ascertained by starting from the Carrillo and State street monument. (*Penry v. Richards*, 52 Cal. 672; and see remarks of Justice Cooley cited in *Bullard v. Kempff*, ante, p. 9.) We simply hold that the court, having the facts before it as to the two methods of ascertaining the lines of Laguna street, had the right to judge as to which method was the more satisfactory and nearest in conformity with the actual original location. Defendants in their brief present no points or objections other than those noticed, and, as we find no error, it is advised that the judgment and order be affirmed.

Searls, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., McFarland, J.

[L. A. Nos. 292, 293, 294, 295. Department Two.—December 1, 1897.]

COUNTY OF INYO, Respondent, v. PERRO ERRO, Appellant in No. 292; DOMINGO HIGOA, Appellant in No. 293; JUAN INDA, Appellant in No. 294; ANTONE ERRACA, Appellant in No. 295.

COUNTY ORDINANCE—LICENSE TO PERSONS ENGAGED IN SHEEP BUSINESS—VALIDITY—CONSTRUCTION OF COUNTY GOVERNMENT ACT.—A county ordinance requiring the procurement of a license by "every person engaged in the business of raising, grazing, herding, or pasturing sheep in the county," is valid, and within the power conferred upon boards of supervisors under subdivision 27 of section 25 of the County Government Act of 1893, authorizing them "to license for purposes of regulation and revenue all and every kind of business

not prohibited by law and transacted and carried on within the county," and it is no objection to the validity of the ordinance that it uses the words "engaged in," instead of the words "transacted and carried on" employed in the act, as each form of expression involves the other in its meaning.

ID.—APPLICABILITY OF ORDINANCE — PASSAGE OF SHEEP THROUGH COUNTY—GRAZING AND PASTURAGE—QUESTION OF FACT—FINDINGS—CONFLICT OF EVIDENCE.—Though such ordinance is not applicable to one who merely drives a band of sheep through a county, yet the license tax cannot be evaded, when it is evident that the real object in so doing, and what is really done is to graze and pasture the sheep in the county, and the determination of what is the real object is a question of fact; and where the trial court finds as a fact, under conflicting evidence, that for a period of time the defendant was engaged in the business of raising, grazing, herding, and pasturing sheep in the county, its findings will not be disturbed upon appeal.

APPEALS by the appellants severally from several judgments of the Superior Court of Inyo County and from several orders denying a new trial to each appellant. N. D. Arnot, Judge.

P. W. Bennet, and P. H. Mack, for Appellants.

Richard S. Miner, and P. W. Forbes, for Respondents.

HENSHAW, J.—These appeals were argued and submitted together. They involve identical questions, and the evidence is substantially the same in each case. They, may, therefore, be considered and disposed of together.

The appeals are from the judgments and from the orders denying the defendants new trials.

The questions involved are: 1. The validity of an ordinance of Inyo county requiring the procurement of a license by "every person engaged in the business of raising, grazing, herding, or pasturing sheep in the county;" and 2. The applicability of this ordinance under the evidence to the defendants.

It is first insisted that the ordinance is void on its face. Herein it is argued that, under subdivision 27 of section 25 of the County Government Act of 1893 (Stats. 1893, p. 358), boards of supervisors are authorized "to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted and carried on in such county, . . . to fix the rates of license tax upon the same, and to provide for the

collection of the same by suit or otherwise." The power to license is thus limited to lawful businesses "transacted and carried on" in the county, and it is urged that when the supervisors imposed the license upon those engaged in a business they exceeded their powers; for the words "transacted and carried on," it is contended, are not equivalent to or synonymous with the words "engaged in." In *Ex parte Miranda*, 73 Cal. 365, and *County of El Dorado v. Meiss*, 100 Cal. 268, the ordinances under consideration were identical in language with the one here in question, and the validity of these ordinances was upheld; but against this it is said that the precise point now presented was not called to the attention of this court. Even so, we fail to see either force or cogency in the argument. It is difficult to conceive of one being engaged in a business who does not transact and carry it on, and it is equally difficult to picture one transacting and carrying on a business who is not engaged in it.

The finding of the court as to each defendant was substantially the same and to the following effect: "That on the twenty-seventh day of April, 1895, and continuously thereafter until and including the ninth day of May, 1895, the defendant was engaged in the business of raising, grazing, herding, and pasturing sheep in the said county of Inyo, . . . and did raise, graze, and pasture said sheep and said lands within the said county upon the natural brush and vegetation growing therein." This finding is attacked as being unsupported by the evidence. By the evidence it was shown that the defendants pastured their sheep during the winter months in Kern and perhaps other neighboring counties; that in the spring, feed being exhausted, they drove them into Inyo county from the south, and, following generally the line of the Sierra mountains, continued the drive through Inyo county, a distance of about one hundred and forty miles, into Mono county, where they were pastured during the summer months. It consumed from nineteen to twenty-seven days to drive the sheep through Inyo county, during which time the animals ranged over land of the United States and lived upon the natural herbage of the country. Over this there is no dispute. But upon the part of the defendants evidence was offered to show that the lands thus traversed were not grazing lands; that sheepmen dislike exceedingly the necessity

of driving their bands over such poor and waste country as that in Inyo county, but that the drives were made necessary to enable them to pass from their winter pastures to their summer feeding grounds in Mono county, and that it would be a benefit to sheepmen and to their flocks if the latter could be lifted bodily from Kern county into Mono county, without the need of driving across so long and desolate a strip of territory. But upon the part of plaintiff there was evidence that Inyo county was a part of the regular drive of the sheepmen, and that the pasturage in the county was of exceeding value to the herds; that they came into Inyo county from the Mojave desert much weakened and reduced, and improved materially in condition as they passed through Inyo. It was further shown that the sheep are kept constantly moving in the mountain lands, picking up their sustenance as they go; that Inyo county is one of the regular counties looked to for food by the sheepmen, in the annual movements and migrations of their flocks, and that hundreds of thousand of acres of lands within the county are thus pastured by them. In *County of El Dorado v. Meiss, supra*, it was held that an ordinance similar to this was not applicable to one who drove a band of sheep into the county, where they remained but for seven days upon the owner's land for purposes of shearing, but it was said: "Of course, the license tax cannot be evaded by the mere pretense of driving sheep through a county or into a county for an alleged temporary purpose, when it is evident that the real object in so doing, and what is really done, is to graze and pasture the sheep in the county." The question, then, being one of the purpose and intent with which the sheep are in the county, the determination of the real object must forever be a question of fact. In these cases the trial court found as a fact, under conflicting evidence, and against their contention, that these defendants were engaged in raising, grazing, herding, and pasturing their sheep in Inyo county. There is, of course, no question but that they were engaged in the business; the only question is whether they were engaged in that business in Inyo county, and the conclusion which the trial court reached on this question may not, under the evidence presented here, be disturbed.

The judgments and orders appealed from are therefore affirmed.

McFarland, J., and Temple, J., concurred.

[Crim. No. 361. In Bank.—December 1, 1897.]

Ex Parte JOHN C. EDGAR on Habeas Corpus.

HABEAS CORPUS—FEDERAL QUESTION—APPEAL FROM FEDERAL COURT—STAY OF PROCEEDINGS.—Where a petition to a circuit or district court of the United States for a writ of *habeas corpus* on behalf of a prisoner in the state's prison, who is under penalty of death for murder by sentence of a state court, presents a federal question, an appeal to the supreme court of the United States from an order either remanding the petitioner or refusing him a writ, stays all further proceedings by the state courts or by the state authorities pending the appeal, and by operation of section 766 of the United States Revised Statutes, any such further proceedings, until the determination of the appeal, are null and void.

ID.—VALIDITY OF PROCEEDING BY INFORMATION—QUESTION UNDER FEDERAL CONSTITUTION.—The question whether a proceeding by information, instead of indictment, is in violation of the constitution of the United States, is a federal question; and is none the less such because former cases have been decided by the supreme court of the United States contrary to the contention of one who raises such question by petition to a federal court for a writ of *habeas corpus*, and by appeal to the supreme court of the United States from an order denying the writ.

ID.—STAY—MERIT OF APPEAL NOT TO BE CONSIDERED—ALLOWANCE OF APPEAL—PROOF OF FEDERAL QUESTION.—Where a federal question is presented, upon a petition for a writ of *habeas corpus*, in a federal court, and an appeal has been taken from an order denying the writ, it is the appeal, and not the merit of the appeal, which operates as a stay; and the very fact that an appeal has been allowed by the federal court, after deciding the question presented pursuant to previous decisions of the supreme court of the United States, is equivalent to a declaration of that court that a federal question was presented, and the appeal allowed must operate as a stay.

ID.—VOID CONTEMPT PROCEEDINGS AGAINST ACTING WARDEN OF STATE'S PRISON—DISCHARGE UPON HABEAS CORPUS.—The acting warden of the state's prison is not in contempt of the authority of the state court ordering the execution of a prisoner under sentence of death, in deferring such execution pending an appeal to the supreme court of the United States from an order of a district court of the United States refusing a writ of *habeas corpus* to the prisoner; and, if imprisoned for contempt for so doing by order of the state court, will be discharged upon *habeas corpus*.

WRIT of *habeas corpus* in the Supreme Court to the Sheriff of San Diego County to test the validity of the imprisonment of the petitioner under contempt proceedings had in the Superior Court of San Diego County. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

John R. Aiken, and D. J. Murphy, for Petitioner.

A. H. Sweet, District Attorney, for Respondent.

HENSHAW, J.—John C. Edgar was adjudged guilty of contempt by the superior court of San Diego county, and was punished therefor by a fine of two hundred dollars, with the alternative of imprisonment. This hearing is under his application for a writ of *habeas corpus*.

The facts giving rise to the alleged contempt are the following: One Joseph Japhet Ebanks was convicted of murder in the first degree before the superior court of San Diego county, and, upon appeal to this court, the judgment of conviction and the order denying him a new trial were affirmed. Thereafter Ebanks was brought before the superior court of San Diego county, which pronounced its order, fixing the day of execution on the eighth day of October, 1897, within the walls of the state prison at San Quentin. Pursuant to this order Ebanks was delivered to the custody of the warden of that institution. Upon the day fixed for his execution Ebanks made application to the district court of the United States in and for the northern district of California, praying for a writ of *habeas corpus*, alleging that he was restrained of his liberty by W. E. Hale, warden of said prison, in violation of his rights under the constitution of the United States, and setting up certain facts in support of this allegation. The district court denied his petition, whereupon he appealed from the order so denying his application, to the supreme court of the United States, and therewith petitioned said district court that his appeal be allowed, and that a transcript of the records, proceedings, and papers upon which said order was made be transmitted to the supreme court of the United States. The district court made its order allowing the appeal. Certified copies of all the papers in the matter of the application and of the appeal were served upon petitioner, John

C. Edgar, as acting warden of the state prison at San Quentin, the warden at that time being absent from the state of California. These papers were served upon Edgar before the execution and before the expiration of the time limited for the execution.

The acting warden was thus placed in a most trying and difficult position. He was called upon to decide at his peril whether or not Ebanks' appeal to the supreme court of the United States operated to stay his hand as an executive officer of the state of California. If the appeal did operate as a stay, and he decided that it did not, and proceeded with the execution, he would be guilty of unlawfully taking the life of a human being. If, upon the other hand, the appeal did not operate as a stay, and he decided that it did so operate, he stood liable to be punished for contempt for violation of the order of the superior court of the state. In this clash of judicial authorities there was no court to which he could look for direction. It was incumbent upon him to make his own choice, unaided by the decision of any judicial tribunal. He concluded that the appeal of Ebanks operated to stay the hand of the state authorities, and therefore declined to execute the death warrant, whereupon he was cited before the superior court of San Diego county, and, upon a presentation of these facts, none of which is disputed, was adjudged guilty of contempt and punished therefor, as above set out.

The reasoning by which the superior court reached its conclusion in the matter may be thus summarized: The courts of the United States are courts of limited jurisdiction. The presumptions in any given case are not in favor, but against, their jurisdiction. In a petition for *habeas corpus* to a circuit or district court, whereby it is sought to arrest the hands of the state authorities, upon the ground that the defendant is restrained of his liberty in violation of the constitution or laws of the United States, there must appear upon the face of the petition averments of substantial facts presenting a federal question. The mere naked averment of a conclusion of law that a defendant is so illegally restrained is not sufficient to confer jurisdiction. Where jurisdiction has not been conferred by a sufficient petition, an appeal by the petitioner from an order remanding him after hearing, or from an order refusing his application for a

writ (as in the present case), will not operate upon the state courts and authorities to stay proceedings.

The soundness of the court's reasoning in these particulars we need not here pause to consider.

It further decided, after elaborate discussion and consideration, that the petition of Ebanks to the district court did not set forth facts raising or presenting a federal question, and therefore concluded that the federal courts never obtained jurisdiction, and that the hands of the state authorities were never stayed. In consonance with this conclusion it adjudged the petitioner to be guilty of contempt.

It has been declared unnecessary to consider the trial court's reasoning to the effect that in cases such as this, if the petition does not present a federal question, the state authorities are at liberty to act despite the petitioner's appeal. This is so far the very obvious consideration that, if it shall appear that a federal question was presented in the Ebanks petition, the reasoning has no application to the case at bar, for it is admitted by all concerned that if a federal question be presented in such a case, and an appeal be taken from the order of the district court, either remanding the petitioner or refusing him a writ, then, by operation of section 766 of the Revised Statutes of the United States, all further proceedings in the matter against the petitioner in the state courts, or by the state authorities, until the determination of his appeal, are null and void.

In the present unhappy condition of the United States laws governing rights of appeal in *habeas corpus* cases, and controlling state authorities while such appeals are pending, many vexatious questions will certainly arise. It must needs be most embarrassing for state courts to determine for themselves whether or not a federal question is presented in such a case in advance of a decision by the United States supreme court, whose judgment is always the controlling arbitrament in the matter. In this instance, however, little difficulty need be experienced. The allegations of the petition of Ebanks distinctly presented the proposition that he had been put upon trial under information, and not under indictment, and that for this reason his conviction and detention were in violation of the United States constitution. That this averment presented a federal question

there can be no doubt, and it is none the less a federal question because in former cases it had been decided contrary to his contention, for the proposition was distinctly treated and passed upon by the United States supreme court in *Hurtado v. California*, 110 U. S. 516, and in later cases, as a federal question. It being a federal question, the fact that it had been decided upon one man's appeal contrary to his contention does not debar another man from raising and presenting it as a federal question before the same tribunal in his own appeal. Where a federal question is presented, it is the appeal, and not the merit of the appeal, which operates as a stay. Thus, in our own state, an appeal from the judgment in capital cases operates to stay the execution until its determination. No matter how frivolous might be the proposition presented upon appeal, nor how many times it had been decided by the appellate tribunal contrary to this particular appellant's contention, no one would question but that his appeal operated to stay the judgment of execution.

Moreover, it appears that the district court, while denying Ebanks' application for a writ of *habeas corpus*, granted him leave to appeal. It is inconceivable that leave to appeal would have been granted if, in the view of that court, a federal question had not been presented. It was the equivalent of a declaration by the judge that he decided the federal question as he was bound to do, in consonance with the decision of his superior tribunal in the *Hurtado* case, but that, notwithstanding, since this federal question had been presented to him, the applicant had the right still further to present it in his own case and on his own behalf to the supreme court of the United States, regardless of its decisions upon the same question in the appeals of other men.

Having thus reached the conclusion that a federal question was presented upon the Ebanks petition to the district court, his appeal to the supreme court of the United States unquestionably operated as a stay (*In re Jugiuro*, 140 U. S. 291), and the acting warden was not in contempt of the authority of the state courts in deferring the execution.

Wherefore, let the prisoner be discharged.

Beatty, C. J., Harrison, J., McFarland, J., and Temple, J., concurred.

GAROUTTE, J., concurring.—The petitioner, Edgar, acting warden of the state prison, asks to be discharged upon *habeas corpus*. He has been adjudged guilty of a contempt of the superior court of San Diego county in not carrying out an order of that court directing the execution of one Ebanks, and is now restrained of his liberty. His defense to the alleged contempt is, that by virtue of certain proceedings had in the federal courts a stay of execution was created. These proceedings consisted in the presentation and filing of a petition for a writ of *habeas corpus* in behalf of Ebanks before the district court of the northern district of the state of California, a denial of the application for the writ by that court, and an appeal from said order of denial to the supreme court of the United States.

Do the proceedings in the federal courts result in a stay of the execution of the order of the state court commanding the warden to execute Ebanks? If such stay exists, it is by virtue of section 766 of the Revised Statutes of the United States, which it is claimed provides for a stay of proceedings pending an appeal from an order made by a district or circuit court refusing the issuance of a writ of *habeas corpus*. Conceding this statute has that effect in many cases, still I am not prepared to say that it has such effect in all cases; but, upon the contrary, I am clear that the appeal can only have such effect when the petition for the writ upon its face recites facts which invoke the jurisdiction of the federal court. In other words, the petition must show that the person is restrained of his liberty in violation of the constitution of the United States, or a law or treaty thereof. It is only in that class of cases that the federal court has jurisdiction, and in such cases only that the state court may be ousted of jurisdiction. The state court loses no jurisdiction until the federal court takes jurisdiction, and the federal court can take no jurisdiction by inference or presumption. Affirmative jurisdictional facts must appear upon the face of the petition, or a federal court is powerless to render any decree. It follows that an appeal taken from an order of a federal court refusing the issuance of a writ of *habeas corpus* based upon a petition, showing no federal question, does not stay the hand of the state court, and the execution of its judgment, notwithstanding such an appeal, may be enforced in all appropriate ways.

It is the law of the land that state courts have the exclusive power and right to deal with state questions. Congress has no power to obstruct the ordinary administration of the criminal laws of the state courts. Such an attempt would be a gross trespass upon the sovereign power of the states of this Union, and would be so recognized by all judicial tribunals. The states have given no such power to Congress; and any attempt upon its part to declare that "an appeal from an order of a federal court refusing the issuance of a writ of *habeas corpus*, regardless of the issues raised by the petition, stays the execution of the judgment of the state court," is unconstitutional and void. It necessarily follows that to support the validity of the section of the Revised Statutes heretofore quoted, and give it force and effect, the construction must be maintained that it only applies where the petition for the writ raises a federal question.

It is argued that this construction of the law casts upon the warden of the state prison the grave responsibility of determining when the petition for the writ discloses the presence or absence of a federal question. So be it. All executive officers must at their peril decide important questions. In every capital case, when the moment arrives for carrying out the judgment of the court the warden must assume the great responsibility of determining whether or not a stay of execution is in force and effect. By virtue of the provisions of section 1243 of the Penal Code a certificate of probable cause may be granted by a justice of this court in certain cases, which certificate has the effect, when filed, to stay the execution of the judgment. I am convinced that under this section a certificate of probable cause cannot issue upon an appeal from an order made after final judgment of conviction; and that a stay of the execution of such order could only be had by the issuance of a *supersedeas* from the appellate court. Yet this question of law and many others are matters which must be decided by the warden according to his lights whenever they face him, and the responsibility rests upon him of deciding them correctly.

Again, we have no conflict of jurisdiction in this case. It has been nowhere decided by a federal court that the petition of Ebanks for the writ disclosed a federal question. No federal court has yet decided that it has jurisdiction to hear and deter-

mine the matters raised by his petition. The question is still an open one, and, being open, this court is entirely free to deal with it and declare the law as it believes it to be. To be sure, the question is a delicate one, but this court neither can nor should evade it for that reason. If there is a stay of the superior court's order fixing the day for the execution of Ebanks, such stay exists by reason of the appeal from the order of the federal court denying the application for his writ. That appeal stays the order of the superior court if the petition forming the basis of that order presents a federal question. Hence, the vital issue, and the only issue, before this court is, Was there such federal question presented to that court? This court is now passing upon the present status of the jurisdiction of a superior court of the state as to a particular cause. The question of jurisdiction is squarely presented, and must be met and decided regardless of the particular matters of law or fact which are necessary to be considered in its determination.

The petition for the writ of *habeas corpus* discloses that the petitioner, Ebanks, was tried and convicted upon a charge of murder not set forth by indictment of a grand jury, but by an information of the district attorney. It is now insisted that such a procedure does not constitute due process of law. The issue raised by this contention presents a question for the decision of the federal courts, and these courts have so recognized it in the past. *Hurtado v. California*, 110 U. S. 516, exhaustively discusses the merits of the contention, and holds against the present claims of Ebanks. But, nevertheless, a federal question is presented, and the fact that, judging by the past, it surely will be decided by the supreme court of the United States against him, in no way precludes the issue of its federal character. The *Hurtado* case has since been followed in *McNulty v. California*, 149 U. S. 648, and also in the recent case of *Durrant*. The petition for the writ in the *Durrant* case is laid upon the same lines as that in the present case, in all substantial matters; and, if the *Durrant* petition had stated no federal question, the appeal from the order refusing the writ of *habeas corpus* would have been dismissed by the supreme court of the United States. Yet such action was not taken, but, on the contrary, the appeal

was heard and decided upon the merits, the court thereby recognizing the presence of a federal question before it.

There is no other federal question raised by the Ebanks petition, save the one to which allusion has here been made. Indeed, in the ordinary trial of a defendant charged with murder based upon an information by the district attorney, it is not apparent that any other federal question could be raised. Hence, it appears that the legal difficulties and delays which have arisen in the Ebanks case by reason of the *habeas corpus* proceedings inaugurated before the federal courts may be largely avoided in future cases by proceeding against defendants charged with the crime of murder upon indictment by the grand jury, rather than by information filed by the district attorney. If such course is adopted by prosecuting officers, I do not believe the present unfortunate condition as to the judgments of state courts in capital cases will ever be repeated.

By reason of the foregoing views I agree with the other members of the court in holding that the acting warden, Edgar, should be discharged from custody.

[Sac. No. 265. Department Two.—December 2, 1897.]

A. H. CREW and F. C. LUSK, Respondents, v. LIZZIE E. PRATT et al., Respondents. DANIEL SULLIVAN et al., Appellants.

ESTATES OF DECEASED PERSONS—TRUST UNDER WILL—CONSTRUCTION—ANNUITIES—COMMENCEMENT AT DEATH OF TESTATOR—TIME OF PAYMENT.—Where a trust created under a will has but seven years to run, and the will provided that the beneficiaries should receive annuities from the trustees for seven years, and there appears no express intention to fix upon another time for the commencement of the annuities, they must be held to commence at the decease of the testator, in accordance with section 1368 of the Civil Code; and a clause in the will providing for payment of annuities as soon as the trustees should have sufficient funds available for that purpose is to be construed as relating only to the time of payment, and not to the date when the annuities begin to run.

ID.—CLASSIFICATION OF ANNUITIES—FIRST CHARGE—FAILURE OF FUNDS—RESORT TO GENERAL ASSETS.—The fact that the annuities were classified, and six of them were made subordinate to the first four,

which were made a first charge upon any moneys in the hands of the trustees, does not require that the charge upon the revenue of each year shall be borne only by the revenue of that year, or affect the obligation of the trustees, to pay each and all of the annuities as of the date of the death of the testator, whenever and so long as there are sufficient funds or assets of the trust estate to meet them; and, under subdivision 3 of section 1357 of the Civil Code, if the fund or property out of which any annuities are payable fails, resort may be had to the general assets, as in case of a general legacy.

ID.—TEMPORARY FAMILY ALLOWANCE—PAYMENTS AFTER RETURN OF INVENTORY—SETTLEMENT OF FINAL ACCOUNT—ANNUITY TO WIDOW—OFFSET.—Where a family allowance was made to the widow prior to the return of the inventory, although such allowance is in its nature temporary, and only continues until the return of the inventory, and although payments made thereon after the return of the inventory are at the peril of the executors, yet the court has power to credit the executors with any reasonable sum of money thus expended, and where they are credited therewith in their final account, and no appeal is taken from the order of settlement, the question of family allowance to the widow is adjudicated, and the adjudication cannot be attacked collaterally, nor can any offset be claimed to an annuity payable to the widow from the date of the death of the testator, on account of payments made to her for family allowance after the return of the inventory.

APPEAL from an order of the Superior Court of Butte County, denying a new trial. John C. Gray, Judge.

The facts are stated in the opinion.

Charles F. Hanlon, and E. L. Campbell, for Appellants.

F. C. Lusk, and McKinstry & McKinstry, for Respondents.

SEARLS, C.—This action is brought by the plaintiffs, trustees under the last will of O. C. Pratt, deceased, to obtain a decree of the court determining whether an annuity, provided in said last will to be paid to Lizzie E. Pratt, widow of said O. C. Pratt, deceased, shall be so paid from the date of the death of said deceased, viz., from October 24, 1891, or from the date of the decree of distribution, viz., May 19, 1893.

The defendants are the heirs at law of said O. C. Pratt, deceased, and devisees and legatees under said last will.

The court, by its final decree, directed the said plaintiffs, trustees, to pay the defendant, Lizzie E. Pratt, said annuity from and after the date of the death of said O. C. Pratt, viz., the

twenty-fourth day of October, 1891, and continuing for seven years, etc.

Lucy C. Goodspeed and Annie M. Pratt and Orville C. Pratt, second, minors, by their guardian, E. C. Campbell, moved for a new trial, which was refused, and this appeal is taken from such order denying a new trial. O. C. Pratt, as before stated, died October 24, 1891, testate. His last will was admitted to probate in November of the same year at Butte county. The estate, consisting largely of real estate situate mainly in the counties of Butte and Glenn, was valued at about one million dollars.

After bequeathing and devising certain portions of his estate to sundry of his relatives, the said O. C. Pratt by his said last will gave, bequeathed, and devised to the plaintiffs, A. H. Crew and F. C. Lusk, all the rest and residue of his estate, real, personal, and mixed, in trust, to take possession thereof, to pay when due all lawful charges and taxes thereon, and to hold and manage the same for seven years from and after his death, to lease either for a money rental or in kind in such manner as to them might seem most advantageous, etc. And also to "provide and turn over to Mrs. Lizzie E. Pratt, my wife, the sum of seven thousand five hundred dollars (\$7,500) each year for the following seven years, for her maintenance, the same to be paid in semi-annual installments of three thousand seven hundred and fifty dollars (\$3,750) each, the first as soon after my decease as sufficient funds for the purpose shall come into their possession, and the remaining ones at the end of every six months afterward."

The testator then proceeds to provide annuities in different amounts to be paid in like manner to three other annuitants for seven years. The will then proceeds as follows: "The foregoing payments and each of them are, after the payment of the annual taxes of the estate, to be a first charge upon and made out of any money to come into the hands of said trustees on account of my estate, as well as from rents, the sale of grain or other personal or mixed property belonging to and to belong to my estate."

The will then provides for sundry other payments to be made for seven years and to be paid annually to six persons therein named. The payments to the six persons last named "are to be made subsequent and subordinate to the first four named,"

etc. It was further provided that at the end of seven years the trustees should convey the property as therein specified.

The executors named in the will and codicil thereto administered the estate, filed their final account and petition for distribution. The former was settled and allowed, the estate distributed in accordance with the terms of the will, and the executors discharged. The trustees of the trust created by the will took possession of the trust estate, and have since administered the trust. The decree of distribution was entered May 9, 1893, and no appeal was ever taken therefrom.

1. The question of the validity of the trust in the will of O. C. Pratt and in the decree of distribution does not seem to have been raised in the court below, and is only briefly discussed here. That question is disposed of in favor of the validity of the trust in a case between the same parties, decided herewith and numbered "Sacramento No. 321," *post*, p. 139. It need not be further mentioned here.

2. Appellants contend that the decree of distribution makes the annuity payable at such time after May 19, 1893 (the date of said decree), as the trustees may have sufficient funds in their hands applicable to that purpose.

The decree of distribution, following the will, creates Crew and Lusk trustees to take possession of and manage certain property for seven years from the death of the testator, and at the expiration of that period to convey the property to the devisees therein mentioned.

They are commanded to pay over to Mrs. Lizzie E. Pratt, the widow of the testator, "seven thousand five hundred dollars each year for the following seven years for her maintenance." The first semi-annual payment is to be made "as soon after his decease as sufficient funds for the purpose shall come into their possession."

As the trust has but seven years to run, and the beneficiaries were to receive annuities from the trustee for seven years, it is fair to conclude that the testator intended the annuities, like the trust, to commence at the date of his death. There is certainly nothing in the will or decree fixing any other date as the time of commencement. The clause in the will and decree, to which counsel refer as evidence of a contrary intent, relates to the time

of payment (viz., as soon as they should have sufficient funds, etc.), and not to the date when the annuities should begin to run. Finding then no express intention to fix upon another time, the latter clause of section 1368 of the Civil Code applies, which is as follows: "Annuities commence at the testator's decease."

There was no error in the construction of the court below fixing the death of the testator as the date at which the annuity commenced.

3. It is further urged by appellants that the judgment is erroneous, and a new trial should be granted, for the further reason that the alleged trust created by the will of O. C. Pratt distinctly requires that the charge upon the revenue for each year shall be borne by the revenue of that year and not otherwise.

The reasons advanced in support of this position are: (a) That under the will the trustees were to take possession of and manage the estate, and to pay to the annuitant, Mrs. Lizzie E. Pratt, seven thousand five hundred dollars per annum in semi-annual installments, "the first as soon after my decease as sufficient funds for the purpose shall come into their possession"; (b) That the annuities were classified, and six of them were made subordinate to the first four, which said first four annuities "shall be a first charge upon and made out of any money to come into the hands of said trustees on account of my estate, as well as from the sale of grain or of other personal and mixed property belonging to and to belong to my estate."

We fail to appreciate the conclusion which the learned counsel drew from the premises. It will be observed that the first payment is to be made whenever, after the payment of the legal obligations of the testator, his funeral expenses and taxes, the trustees shall have sufficient funds in their hands for that purpose.

There is no intimation that if sufficient funds shall not be forthcoming to pay the annuities either in full or in part in any one year, that the annuitants were to forego such payments, or that the trustees were to be absolved from making them as soon as funds came into their hands applicable to that purpose.

Again, the first four annuities are made a first charge (after payment of taxes) upon and to be paid out of any money to come into the hands of the trustees from any source, on account of the

estate, whether from "rents, sales of grain, or other personal and mixed property belonging to and to belong to his estate."

"An annuity is a bequest of certain specified sums periodicaly; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy." (Civ. Code, sec. 1357, subd. 3.)

This provision of the code, like that providing when annuities are to commence, was doubtless adopted to cut off what had previously been a fruitful source of litigation. Under it and the trust provision of the will and decree of distribution, we are of opinion the annuitants and each of them are entitled to the payment of the specific sums awarded them, so long as the income of the property or assets of the trust estate are adequate to that end.

4. The further objection is made that certain sums of money paid by the executors of the will of O. C. Pratt, deceased, to Lizzie E. Pratt subsequent to the return of the inventory, viz., subsequent to April 4, 1892, as a family allowance, was paid to and received by her without authority in law, and should be applied upon the annuity claimed by her under the will of the testator.

The facts upon which the question turns may be briefly stated as follows: "On the seventh day of December, 1891, Lizzie E. Pratt filed her petition for a family allowance of fifteen hundred dollars per month for the support of herself and infant son, O. C. Pratt, Jr., to run from the twenty-fourth day of November, 1891 the date of the death of her husband, O. C. Pratt.

The petition showed that O. C. Pratt left a last will, which had been admitted to probate and executors appointed thereunder, but that no inventory of the estate had been returned; that the estate was of the value of one million dollars and yielded a revenue of thirty thousand dollars per annum; that she had only a small amount of property (describing it) "and such rights as she may be adjudged to have in the estate of her said husband under his will and by virtue of her community rights thereto; that neither she nor her said son had any present income," etc.

On the same day the superior court made an order containing the usual recitals, and allowing her the sum of twelve hundred and fifty dollars per month for the support of petitioner and her said infant son, to run from November 24, 1891, and payable

monthly "until the further order of the court." This sum was paid to her monthly until the date of the final decree of distribution, viz., until May 19, 1893, a period of say, eighteen months. The inventory of the estate was returned April 4, 1892.

The sums of money so paid were included in the final account of the executors, and such account, after due notice, was regularly settled and allowed without objection, by order of the court duly made and entered; no appeal has been taken from said order, and the same is in full force and effect, unchanged and unmodified.

Upon the death of a person, his widow and minor children, until letters are granted and the inventory is returned, are entitled, among other things, "to a reasonable provision for their support, to be allowed by the superior court or a judge thereof." (Code Civ. Proc., sec. 1464.)

In *In re Lux*, 100 Cal. 593, the court, in speaking of a family allowance under section 1464, *supra*, said that "the allowance here provided for is intended to be in the nature of a preliminary or temporary allowance, not extending beyond the return of the inventory," etc., and held that an allowance under that section does not continue beyond the date of the return of the inventory.

We must conclude, therefore, that the order of a family allowance in this case, under the order of December 7, 1891, ceased April 4, 1892, when the inventory was returned.

The argument which appellants advance on this state of the case is, that as there was no formal order made for the payment of a family allowance after the return of the inventory, the executors were without power to pay any money to the widow for the support of herself and infant son, and that the court was without authority to approve such payments in the settlement of the account of the executors, and, as a conclusion from this argument, it is claimed that the trustees named in the will may refuse to pay the annuity therein provided for, or may set off the sum paid by the executors as a family allowance and approved by the court against the sum due upon the annuity. We do not assent to the soundness of the argument or concur in the conclusion deduced therefrom.

When, after the coming in of the inventory, the executors continued to pay the widow the same allowance for family support which they had previously paid under the order of the court, they did so at their peril and were subject in their final settlement to have their account therefor surcharged by those in interest, and disallowed by the court if it found it to be improper or unreasonable.

The power of the court to credit the executors in a proper case for money paid under such circumstances was enunciated in *Miller v. Lux*, 100 Cal. 609, *In re Lux*, 100 Cal. 606, and *In re Lux*, *supra*. In those cases there had been an order for a family allowance, before the coming in of the inventory, of two thousand five hundred dollars per month, under which the executors had continued to make payments as though the order was still in force long after the inventory was filed. A subsequent order had been made allowing the widow one thousand dollars per month.

The court below, in settling the account of the executors had refused to allow the executors anything for moneys paid the widow subsequent to the coming in of the inventory and prior to the allowance of one thousand dollars per month, etc. This court in *In re Lux*, *supra*, said that: "In the matter of paying a family allowance, 'the administrator is not required to wait for an order of court, but may make the necessary expenditures as the exigencies occur, and the court will allow such sums as may be reasonable in the settlement.'" (Citing *Woerner on American Law of Administration*, sec. 92; *Sawyer v. Sawyer*, 28 Vt. 248; *Simmons v. Byrd*, 49 Ga. 284.)

In *Miller v. Lux*, *supra*, at pages 616 and 617, this court, on a motion for rehearing, said in substance that the order appealed from in that case allowing one thousand dollars per month having been reversed, it would become the duty of the court below, in settling the accounts of the executors, to credit them "with such sum as it finds was reasonably and properly advanced by them for the purpose named," whether it was a sum greater or less than one thousand dollars per month. In short, that they should be credited with such sum paid by them as was reasonable for the support of the widow.

It follows that the court in the present instance had jurisdic-

tion to determine what was a sufficient sum for the support of the widow, and having done so, and credited the executors with the sum of twelve hundred and fifty dollars per month paid by them for that purpose, and settled their final account containing such items, and no appeal having ever been taken from such order of settlement, the whole question is foreclosed and cannot be attacked collaterally as is attempted here.

This view renders it unnecessary to inquire whether or not, if Lizzie E. Pratt had received from the executors as a family allowance funds to which she was not entitled, the amount thereof could be deducted from her annuity by the trustees under the will, between whom and the executors there was and is no privacy.

The court below found that the family allowance was not paid or received in lieu of the annuity, and found against the appellants here upon all the issues upon which an estoppel could be predicated.

The findings cover all the material issues in the case, and are supported by the evidence.

We recommend that the order of the court below denying the motion for a new trial be affirmed.

Belcher, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the order of the court below denying the motion for a new trial is affirmed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[Sac. No. 321. Department Two.—December 2, 1897.]

A. H. CREW and F. C. LUSK, Respondents, v. LIZZIE E. PRATT et al., Respondents. DANIEL SULLIVAN et al., Appellants.

ESTATES OF DECEASED PERSONS—VALIDITY OF TRUST UNDER WILL—TERM OF YEARS—SUSPENSION OF POWER OF ALIENATION.—A trust provided for in a will which suspends the absolute power of alienation for a fixed term of years, not depending upon the duration of

lives in being, must be held invalid upon a direct appeal from a decree distributing the testator's estate to the trustees named in the will.

ID.—DECREE OF DISTRIBUTION TO TRUSTEES—PROCEEDING IN REM—FAIL-TO APPEAL—CONCLUSIVE ADJUDICATION OF VALIDITY OF TRUST—ACTION BY TRUSTEES.—The distribution of the estate of a deceased person is a proceeding *in rem*, and the action of the court in making the distribution binds the whole world, subject only to be reversed, set aside, or modified upon appeal; and a decree distributing the estate to trustees named in the will of the decedent, which has become final by failure to appeal therefrom, though erroneous, is a conclusive adjudication of the validity of the trust, and cannot be collaterally assailed by the heirs, legatees, or devisees, or their representatives, in an action brought by the trustees against them to have it adjudged that plaintiffs are the owners as trustees of the estate devised in trust to them, and that defendants have no estate in the premises except as beneficiaries of the trust.

ID.—JURISDICTION OF SUBJECT MATTER—POWER OF ERRONEOUS DECISION—COLLATERAL ATTACK—SELECTION OF TRUSTEES AS DISTRIBUTEES—POWER TO DETERMINE VALIDITY OF TRUST.—Jurisdiction of the subject matter includes power to pronounce the resulting judgment over which the jurisdiction extends, and to decide wrong, as well as to decide right, so far as the validity of its judgment is concerned, as against a collateral attack; and a court having jurisdiction over the subject matter of the distribution of the estate of a deceased person, and to determine to whom, and in what proportions it shall be distributed, has power erroneously to select the trustees named in the will as distributees of the trust, and incidentally to determine the validity of the trust, and the lawfulness of the right of the trustees to take under the will, and its determination, though erroneous, can only be corrected upon appeal, and is not open to collateral attack.

ID.—PROBATE OF WILL—PROOF OF PUBLICATION IN DAILY PAPER.—A notice of the time fixed for the probate of a will is sufficiently proved to have been published in a daily paper for the requisite period by an affidavit showing that it was published in a paper purporting by its name to be a daily paper, daily for eleven days.

ID.—SETTLEMENT OF FINAL ACCOUNT AND DISTRIBUTION—PROOF OF POSTING NOTICE—AFFIDAVIT MADE UPON DAY OF POSTING—PRESUMPTION.—It is no objection to the jurisdiction of the court to settle the final account of executors, and to order distribution of the estate of a decedent, that the affidavit of the posting of the notice of the hearing was made on the day of the posting; but the presumption is that the notice remained posted during the statutory period.

ID.—RECITALS IN DECREE—DUE SERVICE OF NOTICE—COLLATERAL ATTACK.—Where a decree recites due service of notice by publication or by posting, such recital is sufficient to prove such service, as against a collateral attack.

ID.—APPEARANCE AT HEARING—WAIVER OF OBJECTION TO NOTICE.—The appearance or representation of all the heirs at the hearing on final distribution, is a sufficient answer to any objection to the sufficiency of the notice of the hearing.

APPEAL from a judgment of the Superior Court of Butte County and from an order denying a new trial. John C. Gray, Judge.

The facts are stated in the opinion.

Charles F. Hanlon, J. S. Spilman, and E. L. Campbell, for Appellants.

F. C. Lusk, McKinstry & McKinstry, Eugene R. Garber, J. D. Sproul, and S. F. Leib, *Amicus Curias*, for Respondents.

SEARLS, C.—This action was brought in the superior court of the county of Butte against the heirs, devisees, legatees, and representatives of the heirs, devisees, and legatees of O. C. Pratt, deceased, who died testate October 24, 1891, being at the time of his death a resident of said Butte county, for the purpose of having it adjudged that the plaintiffs are the owners as trustees of certain premises in the complaint described, and that defendants have no estate in said premises except as *cestui que trustent* of said trust, and to have it determined whether a certain trust under and pursuant to the last will and testament of said O. C. Pratt, deceased, whereby the plaintiffs herein were appointed trustees, etc., is valid or invalid, etc.

The cause was tried by the court and written findings filed, upon which a decree was entered declaring the trust to be a valid subsisting trust, that plaintiffs are the trustees thereof, and as such are entitled to the possession of the trust property as trustees, etc.

From this decree and from an order denying their motion for a new trial E. L. Campbell, guardian of the estates of Orville C. Pratt, 2d, and Annie M. Pratt, and E. L. Campbell, trustee, and Alice L. Lothrop, executrix of the last will and testament of Kate M. Pratt, deceased, and Daniel Sullivan and Frank N. Meyers, special administrators of the estate of Lucy C. Goodspeed, deceased, appeal to this court.

The last will of O. C. Pratt disposed of property of the value of over one million dollars. After bequeathing and devising certain specific parcels of property to his wife, children, brothers, sisters, etc., the testator, by the ninth subdivision of his will,

gave, devised, and bequeathed to A. H. Crew and Riland Goodspeed all the rest and residue of his property and estate, real, personal, and mixed, in trust, however, for the uses and purposes herein mentioned. By a codicil to the will F. C. Lusk was substituted a trustee in the place and stead of Riland Goodspeed.

As the problem involved in this case is founded upon said ninth subdivision of the will, we set it out in full, premising that the name of F. C. Lusk is to be substituted for that of Riland Goodspeed wherever the latter name occurs as trustee.

"Ninth. All the rest, residue, and remainder of all the property and estate, real, personal, and mixed, of every description and wheresoever situated, of which I may be possessed and to which I may be entitled at the time of my decease, I give, devise, and bequeath unto Riland C. Goodspeed, my son in law, and unto A. H. Crew, a banker, both of Butte county, California, in trust, however, for the following named uses and purposes, that is to say: To take possession of the same, and every part thereof, and pay, when due and payable, all lawful taxes and charges upon, and hold and manage the same for seven (7) years after my decease, by leasing, either for money rental, or in kind, in such manner as to them may seem most advantageous to my estate, to settle and pay all legal obligations outstanding against me, as well as such as may be incurred for my funeral expenses, and also to provide and turn over to Mrs. Lizzie E. Pratt, my wife, the sum of seven thousand five hundred dollars (\$7,500) each year for the following seven years for her maintenance, the same to be paid in semi-annual installments of three thousand seven hundred and fifty dollars (\$3,750) each, the first as soon after my decease as sufficient funds for the purpose shall come into their possession, and the remaining ones at the end of every six months afterward; and, second, to provide and turn over to Mrs. Kate M. Pratt, widow of my deceased son, Charles P. Pratt, of Fruitvale, Alameda county, California, the sum of twelve hundred dollars (\$1,200) for the following seven (7) years for the maintenance of herself and two children, in semi-annual payments of six hundred dollars (\$600) each, the first as soon after my decease as sufficient funds for the purpose shall come into their possession, and the remaining ones at the end of every six months afterward; and, third, to provide and turn over to each

of my stepdaughters, Mrs. Adele M. Kenney and Miss Lillian O. Jones, both of the city and county of San Francisco, as soon after my decease as sufficient funds for the purpose shall come into their possession, the sum of five hundred dollars (\$500) to each of them for their and each of their maintenance respectively, and an equal amount to each of them every year afterward, for seven (7) years next following my decease. The foregoing payments, and each of them, are, after the payment of the annual taxes of the estate, to be a first charge upon and made out of any money to come into the hands of said trustees on account of my estate, as well as from rents, the sale of grain or other personal and mixed property belonging to and to belong to my estate; and thereupon said trustees are directed to pay annually for seven (7) years after my decease unto Mrs. Kate J. Achilles, of Rochester, New York, if she so long lives, the sum of five hundred dollars (\$500); also to pay to Mrs. Alinda J. Bunster, of Victoria, British Columbia, annually for seven (7) years after my decease, if she so long lives, the sum of five hundred dollars (\$500); also to pay to Mrs. Mary A. Putney, of Hartford, Michigan, annually for seven (7) years after my decease, if she so long lives, the sum of four hundred dollars (\$400); also to pay to Alexander M. Pratt, of Janesville, Wisconsin, annually for seven (7) years after my decease, if he so long lives, the sum of five hundred dollars (\$500); also to pay to Jonathan Pratt of Janesville, Wisconsin, annually for seven (7) years after my decease, if he so long lives, the sum of five hundred dollars (\$500); also to pay to Mrs. Frances L. Underwood, of Middlesex, Yates county, New York, annually for seven (7) years after my decease, if she so long lives, the sum of two hundred and fifty dollars (\$250); and also to pay to James S. Pratt, lately of Durham, Butte county, California, annually for seven (7) years after my decease if he so long lives, the sum of three hundred dollars (\$300). The foregoing payments to the seven (7) persons last named are to be made subsequent and subordinate to the first four named out of money to come into the hands of said trustees on account of my estate, and from the proceeds of rents thereof, as well as from the sale of grain raised upon and belonging to, and to belong to, my said estate; and at the expiration of said seven (7) years said

trustees shall divide, turn over, and convey by proper conveyances all the real estate so holden in trust by them, together with all the personal and mixed property remaining in trust in their hands, to the persons in the proportions and kind of estate hereinafter named, that is to say, first, unto Mrs. Lizzie E. Pratt, my wife, for and during her life, a life estate in and to one-half of my real estate, wheresoever situated, but not herein specifically devised; and the rest, residue, and remainder of my interests therein, and every part thereof, after her decease, unto my son, Orville C. Pratt, Junior, and unto his heirs and legal representatives in fee simple absolute; and said trustees shall divide one-half of the remaining personal and mixed property equally between my said wife and son; second, to Mrs. Lucy C. Goodspeed, my daughter, one-quarter of the real estate in fee simple absolute, and one-quarter of the personal and mixed property; and to Orville C. Pratt, second, and Annie M. Pratt, children of my deceased son, Charles P. Pratt, one-eighth to each of the real estate in fee simple absolute, and divide equally between them one-quarter of the personal and mixed property."

The will from which the foregoing extract is made was admitted to probate in the superior court of the county of Butte on the seventeenth day of November, 1891, and John Bidwell and A. H. Crew were appointed and qualified as executors thereof. Such proceedings were thereafter had in the matter of said estate of O. C. Pratt, deceased, in said court, that said estate was ready for settlement and final distribution, and on the third day of April, 1893, the executors of said will filed in said court their final account, their final report, and a petition for the final distribution of said estate.

The petition was set for hearing on the first day of May, 1893, notice thereof duly given as required by law, and on said first day of May, 1893, the hearing of said petition was regularly continued by said court until the nineteenth day of May, 1893, at which last-named date, after due proceedings had, the petition for distribution was regularly heard by the court, and thereupon said court made and rendered its final decree of distribution.

The decree is in the usual form and is full in its recitals of the proceedings theretofore had in admitting the same to probate

and the subsequent acts thereunder, the settlement of the accounts, the filing of the petition for distribution, the giving of notice thereof, the proof thereof, etc.

It further recites that at the hearing of the petition for distribution "the executors are present in court with their attorney, F. C. Lusk; the absent and minor heirs are represented by their attorney, Warren Sexton. Mrs. Lucy C. Goodspeed, one of the heirs of said deceased and a party interested in said estate, is represented by her attorney, Charles F. Hanlon. Mrs. Lizzie E. Pratt, the widow of said deceased, is present in court and represented by her attorneys, Lloyd & Wood. O. C. Pratt, Jr., is represented in court by his general guardian, said Lizzie E. Pratt, and Lloyd & Wood, her attorneys, as such guardian."

After distributing the property devised and bequeathed as in the will provided, it proceeds as follows:

"Sixth. All the rest, residue, and remainder of all property, and estate, real, personal, and mixed, of every description and wheresoever situated, of which said deceased was possessed, or to which he was entitled at the time of his death, is hereby distributed to A. H. Crew and F. C. Lusk, of Chico, California, in trust however, for the following named uses and purposes, that is to say, to take possession of the same and every part thereof," etc.

Then follows the uses and purposes to which, as trustees, they are to devote the property, precisely as in the last will specified, with a description of the property so distributed to said Crew and Lusk as trustees.

The decree of distribution was duly entered and filed in said court on the twenty-seventh day of May, 1893, and was thereafter duly recorded in all the counties of this state in which any part of the property affected thereby was situated. No appeal has ever been taken from said decree of distribution, and the time for an appeal therefrom had expired long before this action was brought.

The executors delivered the property so distributed to said trustees to them, and they have since possessed and held the same, and have acted and are still acting under the terms of said trust and administering the same according to the terms thereof, and each of the persons mentioned as being entitled to receive annuities from said trust has received and accepted from said

trustees, the plaintiffs herein, sums of money on account of such annuities, in amount sufficient so that each annuitant has received and accepted from said plaintiffs, as such trustees, at least one year's annuity according to the terms of said trust.

The estate of O. C. Pratt was finally closed, settled, and the executors of the will were finally discharged from their trust as such May 7, 1894. The trustees have rendered and had settled three annual accounts under their trusteeship, and the term of the trust will expire by its own limitation in 1898.

There is no material conflict in the evidence, and the findings are substantially in favor of the plaintiffs, supporting all the material allegations of their complaint. Aside from some minor questions, which upon a review of the record we regard as of little moment, there are two important questions involved in the case. They are as follows: 1. Was the trust created under the will of O. C. Pratt void under the doctrine enunciated in *Estate of Walkerly*, 108 Cal. 627? 2. If the first proposition be decided in the affirmative, then is the final decree of distribution such a conclusive adjudication of the validity of the trust that it cannot in this collateral inquiry be impeached by the appellants who were parties thereto?

In reference to the first proposition no lengthened discussion is deemed necessary. Section 715 of the Civil Code is as follows: "The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in section 772."

Section 772 relates to the creation of a contingent remainder in fee, upon a prior remainder in fee, has no application to the case in hand, and indeed not be further mentioned. Section 716 of the same code is as follows: "Every future interest is void in its creation which by any possibility may suspend the absolute power of alienation for a longer period than is prescribed in this chapter (chapter 2 of title 2, part I, Civ. Code). Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."

In the present instance, the trust estate created by the will of Pratt is not limited to the life or lives of persons in being, but

extends to seven years, during which period the absolute power of alienation is suspended. In this respect it only differs from the case of *Estate of Walkerly, supra*, where the trust was adjudged to be void, in this, that there the power of alienation was suspended for not less than twenty-five years, while here it is limited to seven years. It is said that in the present case it was conceded in the court below that the trust was void, as against a direct appeal, and it is tacitly conceded here.

We think the case in this respect as to a portion of the beneficiaries squarely within the rule enunciated in *Estate of Walkerly, supra*, and shall therefore assume that the trust was in violation of the law against the creation of perpetuities, which will not countenance the suspension for any fixed period of years, not depending upon the duration of life, since, during the time of such limitation, however short, the persons capable of conveying the interest might die. We assume, therefore, that the trust would have been held void upon a direct appeal from the decree of distribution.

This brings us to the question involved in the second and more important proposition, relating to the effect of the final decree of distribution.

In the Walkerly case, an appeal was taken to this court from the decree of distribution, and the inquiry was founded upon a direct proceeding assailing the validity of the decree.

In the case at bar, no appeal was taken from the final decree of distribution, which, by lapse of one year, became final, and is not now open to direct attack; and the question is, Can it be assailed collaterally by the heirs, legatees, or devisees, who were parties thereto?

Section 1666 of the Code of Civil Procedure, after providing that the decree of distribution shall name the persons and proportions to which they shall be severally entitled, etc., proceeds as follows: "Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal."

Section 1908 of the Code of Civil Procedure is as follows: "The effect of a judgment or final order in an action or special proceeding before a court or judge of the state, or of the United States, having jurisdiction to pronounce the judgment or order, is

as follows: 1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person; 2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

The contention of appellant is that three things are essential to validate a judgment: 1. Jurisdiction of the person; 2. Jurisdiction of the subject matter; 3. Power under the law to pronounce the resulting judgment.

The argument is, that the third essential above mentioned is made the subject of the special care of the legislature in section 1908, quoted *supra*, wherein it is provided that: "The effect of a judgment or final order in an action or proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows," etc.

Law-writers and courts, in treating of jurisdiction, have usually contented themselves with saying that, where courts have jurisdiction of the person and of the subject matter of the controversy, their judgments, if erroneous, are voidable, but not void. That is to say, they are open to direct attack as upon appeal, but not to collateral attack.

In thus defining jurisdiction of the subject matter, it must be understood that the power to pronounce the resulting judgment constitutes a part of the subject matter over which the jurisdiction extends.

In *United States v. Arredondo*, 6 Pet. 691-709, the supreme court of the United States defined jurisdiction to be "the power to hear and determine."

In *Ex parte Reed*, 100 U. S. 13-23, the same court defined it to be "the power to hear and determine and give the judgment rendered."

The court said: "We do not overlook the point that there must be jurisdiction to give the judgment rendered, as well as to hear and determine the case. If a magistrate, having authority to fine for assault and battery, should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed."

Other and later cases in the same court have in substance laid down a like definition of jurisdiction, and fortified the definition by like reasoning and comparison. (See, also, *Ex parte Giambonini*, 117 Cal. 573.)

Was there, then, in the present case a defect of jurisdiction as to anything that was done? Beyond that question, in this collateral attack upon the decree of distribution made and entered in the superior court, beyond this power or jurisdiction, we need not look.

It may be stated, as a general proposition, that a judgment is conclusive, not only as to the subject matter in controversy in the action upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were really met and decided. (Freeman on Judgments, sec. 253; *Parnell v. Hahn*, 61 Cal. 131; *Lillis v. Emigrants etc. Co.*, 95 Cal. 553; *Woolverton v. Baker*, 98 Cal. 631; *Howell v. Budd*, 91 Cal. 342; *Burris v. Kennedy*, 108 Cal. 338; *Estate of Hudson*, 63 Cal. 457.)

In *Auguisola v. Arnaz*, 51 Cal. 435, it was said probate courts have exclusive jurisdiction of the final distribution of the estates of decedents.

And such decree of distribution of an estate, after due notice by the probate court, is conclusive upon a person who might have claimed that a share of the estate belonged to him. (*Freeman v. Rahm*, 58 Cal. 111; *Daly v. Pennie*, 86 Cal. 552; 21 Am. St. Rep. 61; *Estate of Griffith*, 84 Cal. 107.)

The late case of *William Hill Co. v. Lawler*, 116 Cal. 359, is an instructive one upon this point. For the sake of brevity we quote from the syllabus, which conveys fairly well the substance

of the opinion: "The distribution of the estate of a deceased person is a proceeding *in rem*, and every person who may assert any right or interest therein is required to present his claim to the court for its determination, and the action of the court in making the distribution binds the whole world, and is equally conclusive upon every claimant, whether his claim is presented or whether he fails to appear, subject only to be reversed, set aside, or modified upon appeal, and its decree cannot be collaterally attacked for any error committed therein." (See, also, *Estate of Hinckley*, 58 Cal. 457.)

The case of *Greenwood v. Murray*, 26 Minn. 259, is a case on all fours with the one at bar. It was there held that a decree of the probate court assigning to a devisee the property devised establishes conclusively its validity as against all persons interested in the estate, unless an appeal is taken, and if assigned to a trustee in trust the decree establishes the validity of the trust. The will in that case devised certain real estate to Murray in trust to sell the same five years after the death of the testatrix, and to pay the proceeds to certain persons named.

The appellate court held the devise void, as illegally suspending the power of alienation, but that the decree of distribution holding it valid could not be collaterally attacked. Counsel for appellants contend that this last case is in part overruled in the case of *Farnham v. Thompson*, 34 Minn. 330; 57 Am. Rep. 59. We do not so read *Farnham v. Thompson*, *supra*. The only point decided there at all pertinent to the Murray case, was that the probate court had no authority "to determine a controversy between an heir or devisee and a third party claiming from him, and not claiming as heir or devisee." *Greenwood v. Murray*, *supra*, is affirmed as authority in the late case of *Ladd v. Weiskopf*, 62 Minn. 29.

Freeman, at section 257 of his work on Judgments, says: "If a party is entitled to property only by virtue of its devise to him, a decree distributing it to him is conclusive of the devise and its validity."

"A judgment of a court having jurisdiction of both the subject matter and the parties, however erroneous it may be, is a valid, binding, and conclusive judgment as to the matter in con-

troversy upon the parties thereto and to those claiming under them, and cannot be attacked or impeached in a collateral proceeding." (Herman on Estoppel, sec. 366.)

The subject matter upon which the court was called to act in the present instance was the settlement of the final account and distribution of the estate of O. C. Pratt, under his last will. To make the final distribution under section 1666 of the Code of Civil Procedure, "the court must name the persons and the proportions or parts to which each shall be entitled."

As an incident of this duty, it devolved upon the court to determine whether or not there was a valid trust created by the will, and whether the respondents were lawfully created the trustees thereof. The court could not dispose of this question without passing upon the validity of the trust. It was the fulcrum upon which that branch of the case turned. Had the court held the trust invalid, it is not doubted but that its jurisdiction so to do could be upheld. "The jurisdiction to pronounce the judgment or order" mentioned in section 1908 of the Code of Civil Procedure means the right or power of the court to adjudicate upon the point at all, which is the vital question.

This question was determined in the affirmative, and it must be held that the court, so far as the validity of its judgment is concerned and against a collateral attack, has the same abstract right to decide wrong as to decide right. In other words, it is not the result reached which determines whether or not the judgment is void, but the power or authority which we call jurisdiction and which lies behind the mere conclusion that determines the question.

To decide wrong, where authority exists to pronounce judgment, is error, which can only be corrected by appeal, etc. To decide wrong, where no jurisdiction exists to pronounce judgment of the character involved, renders the adjudication void, and it can be attacked anywhere and collaterally.

In the present case, we are of opinion it was, under the law, the duty of the court, to adjudicate the question of the validity of the Pratt trust, and that having done so and adjudged it to be valid, while its conclusion was erroneous and the judgment open to reversal on appeal, yet as no appeal was taken therefrom and

as the time therefor has long since expired, it is not now open to collateral attack.

In the seven briefs on file there is a large citation of authorities pro and con. Much time has been taken up in their examination, and it would be agreeable to discuss them in detail and group them around the different principles involved, showing, as we think may be done, where, with two or three exceptions, they are properly differentiated from the case in hand. To do so, however, would consume more space than is warranted. There are two other points calling for brief notice. It is urged by appellants that the decree of distribution is void: 1. Because the will was not admitted to probate on the notice required by law; 2. That the proof of the posting of notice of the application was insufficient to warrant the decree of distribution.

Upon the first point the objection is that "the proof of publication of notice of probate does not show that the *Chico Daily Enterprise* (in which the notice was published) is a newspaper, nor how often the paper was published, whether daily, weekly, semi-weekly or tri-weekly."

Under section 1303 of the Code of Civil Procedure, notice of the probate of a will is to be given by the clerk by publishing the same in a newspaper of the county, if there is one. If published in a weekly newspaper, it must appear therein on at least three different days of publication. If in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and last day being included.

In the present case, "Watson Chalmers, of said Butte county, being duly sworn says . . . that he is the printer and publisher and proprietor of the *Chico Daily Enterprise*, a newspaper published in said Butte county . . . and that the notice of the time and place of proving will . . . has been published daily in the above-named newspaper, commencing November 5, 1891, and ending November 16, 1891, both days inclusive," etc.

This affidavit shows that the notice was published daily for eleven days, which is one day in excess of the requirement of the statute. The name of the paper is the *Chico Daily Enterprise*, and, if the notice was published therein daily, it must have been a daily paper.

The objection made to the affidavit of posting the notice of time fixed for hearing on settlement of final account and distribution is that the affidavit was made on the day of the posting, viz., April 4, 1893, whereas it is claimed it should have been made at the expiration of the time for which the notice was published.

We might rest with saying, in answer to both these attacks upon the sufficiency of the proofs of publication and notice, that the decrees in each case recite due service by publication and posting, which is, as against a collateral attack, sufficient.

But, waiving this, when an affidavit is made of posting a notice as required by the code, the presumption is that it remained posted during the statutory period. (*Estate of Sbarboro*, 70 Cal. 147.)

It has also been stated herein that all the heirs appeared or were represented at the hearing on final distribution, which is a sufficient answer to any objection to the sufficiency of the notice.

We recommend that the judgment and order appealed from be affirmed.

Belcher, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[Sac. No. 217. Department Two.—December 2, 1897.]

In the Matter of the Trust Estate of O. C. PRATT, Deceased.
DANIEL SULLIVAN et al., Appellants, v. LIZZIE E.
PRATT et al., Respondents.

ESTATES OF DECEASED PERSONS—TRUST UNDER WILL—SETTLEMENT OF ACCOUNT OF TRUSTEES—ERROR IN DATE OF COMMENCEMENT OF ANNUITY—AMENDMENT.—Where an order settling an annual account of trustees under the will of a deceased person erroneously purported to fix the date of the commencement of an annuity upon which payments were made by the trustees at a time subsequent to

the death of the testator, and contrary to the previous express decision of the court that the annuity was to date from the testator's decease, made in an action brought by the trustees to determine the date from which the annuity began to run, it is proper for the court to grant a motion, based upon all the papers and proceedings in both causes, for an amendatory order, such that the sums paid by the trustees should be merely "allowed on account of said annuity."

APPEAL from an order of the Superior Court of Butte County amending a previous order settling an annual account of trustees under the will of a deceased person. John C. Gray, Judge.

The facts are stated in the opinion, and in the decision therein referred to.

Charles F. Hanlon, and E. L. Campbell, for Appellants.

McKinstry & McKinstry, and F. C. Lusk, for Respondents.

SEARLS, C.—This is an appeal from an order of the superior court in and for the county of Butte modifying an order settling the second annual account of A. H. Crew and F. C. Lusk, trustees under the last will of O. C. Pratt, deceased.

The general facts are stated in *Crew v. Pratt*, ante, p. 131, this day decided, and need not be repeated here.

On the twenty-sixth day of March, 1895, the court entered an order settling the account of the trustees for the year 1894, which order, among other things, provided that four thousand dollars, which had been paid to Lizzie E. Pratt on account of her annuity under the last will of O. C. Pratt, should be applied as follows: Three thousand seven hundred and fifty dollars thereof for the six months commencing January 1, 1894, and the balance on account of the second semi-annual installment of her annuity for the half year commencing July 1, 1894.

Lizzie E. Pratt came into court on or about April 28, 1895, and filed and served a sworn notice and sworn statement on a motion to amend the order of the court so far as it purported to fix the periods to which the payments should apply, so that the order would read, "said sums aggregating four thousand dollars are hereby allowed on account of said annuity."

The statement averred the original order to be erroneous, as it in effect provided that the annuity should run from January,

1894, instead of from the date of the death of the testator, O. C. Pratt, and as being contrary to the decision of the court in *Crew v. Pratt, supra*, decided March 20, 1895, in which it was held that the annuity ran "from the death of O. C. Pratt, to wit, from the twenty-fourth day of October, 1891."

The knowledge of the existence of this judgment is given in the statement as a reason why she did not appear at the settlement of the account, etc. The motion is based upon the petition and upon the files, papers, and proceedings in the cause and in the case of *Crew v. Pratt, supra*.

A motion was made to dismiss the motion, which was properly denied, as the papers and proceedings in *Crew v. Pratt, supra*, upon which it was based, showed the original order to be erroneous and the proposed order proper.

The testimony at the hearing did not change the aspect of the case, and the court amended the order.

The case of *Crew v. Pratt, supra*, was brought to determine the date from which the annuity of Lizzie E. Pratt ran, and it was held it commenced at the date of the death of O. C. Pratt, viz., October 24, 1891.

In the opinion in that case, this day filed, every question of any importance discussed on this appeal is noticed, and the judgment in that case is affirmed.

For the reasons there given we recommend that the order appealed from here be affirmed.

Belcher, C, and Britt, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

McFarland, J., Henshaw, J., Temple, J.

[Sac. No. 306. Department Two.—December 2, 1897.]

In the Matter of the Trust Estate of O. C. PRATT, Deceased.
DANIEL SULLIVAN et al., Appellants, v. A. H. CREW et al., Respondents.

ESTATES OF DECEASED PERSONS—TRUST UNDER WILL—SETTLEMENT OF ACCOUNT OF TRUSTEES—ITEMS ALLOWED IN PREVIOUS ACCOUNT.—When the annual accounts of trustees acting under the will of a deceased person have been settled and approved, they are only subject to direct attack by motion to open the settlement, or other like remedy in the superior court, or on appeal, and items allowed in a previous annual account cannot be examined into upon the settlement of a succeeding annual account.

ID.—ITEM FOR SERVICES OF BOOKKEEPER—RELATIVE OF TRUSTEE—DISCRETION.—The allowance of an item for the services of a bookkeeper for the trustees will not be deemed an abuse of discretion, merely upon a showing that the bookkeeper was a relative and employee of one of the trustees, where it does not appear that such trustee had any interest in his earnings, and there is no other or fuller showing against the item.

APPEAL from an order of the Superior Court of Butte County settling an annual account of trustees under the will of a deceased person. John C. Gray, Judge.

The facts are stated in the opinion.

Charles F. Hanlon, and J. S. Spilman, for Appellants.

F. C. Lusk, and McKinstry & McKinstry, for Respondents.

SEARLS, C.—This is an appeal from an order of the superior court in and for the county of Butte settling the third annual account of A. H. Crew and F. C. Lusk, trustees, for the year 1895, under the last will and testament of O. C. Pratt, deceased.

The appellants filed exceptions to the report, which was overruled upon the hearing, and an order entered approving the account, from which order this appeal is prosecuted.

Two or three minor objections were made to the account at the hearing, and the action of the court thereon is assigned as error. One of these briefly stated is as follows: Appellants sought to enter upon an examination of items charged up in the

accounts rendered and settled by the court in 1894 and 1895. This was objected to, the objection sustained, and an exception noted.

The ruling was correct. The accounts, when once settled and approved, were only subject to direct attack by motion to open or other like remedy in the superior court or on appeal. There was also an objection to an item of thirty dollars paid to a bookkeeper.

The record shows no evidence upon which to predicate an objection to this item, except that the bookkeeper was a relative of trustee Crew and worked in his bank. It did not appear that Crew had any interest in the earnings of the bookkeeper, and, in the absence of a fuller showing, we must suppose the court did not abuse its discretion in allowing the item. The other of what we denominate minor objections call for no comment.

The important questions involved in the appeal are those contained in the cases of *Crew v. Pratt*, ante, p. 131, and *Crew v. Pratt*, ante, p. 139, both of which are this day decided.

For the reasons given in those cases we recommend that the order appealed from be affirmed.

Belcher, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 1184. In Bank.—December 2, 1897.]

JOHN N. PIGNAZ, Respondent, v. GEORGE W. BURNETT
et al., Appellants.

APPEAL FROM JUDGMENT—TIME FOR APPEAL—AMENDMENT OF CODE NOT RETROSPECTIVE—DISMISSAL REFUSED.—The amendment to section 939 of the Code of Civil Procedure, approved March 3, 1897, reducing the time allowed for appeal from a judgment from one year to six months to be construed not to be intended to operate retrospectively upon judgments entered before its passage, but as limited in its operation to judgments thereafter entered; and an appeal taken within one year from the entry of a judgment entered before the passage of such amendment and more than six months after such entry, will not be dismissed.

CONSTITUTIONAL LAW—POWER OF LEGISLATURE—RETROSPECTIVE OPERATION OF STATUTES—PRESUMPTION.—Though the legislature has power to give to statutes a retrospective operation, if they are not *ex post facto*, and do not impair the obligation of contracts, or deprive any one of vested rights, yet it is to be presumed that no statute, is intended to have such effect, unless the contrary clearly appears, and especially so where to give the statute retrospective effect would work manifest injustice.

APPEAL—FAILURE TO FILE TRANSCRIPT—DISMISSAL REFUSED — UNSETTLED BILL OF EXCEPTIONS.—An appeal will not be dismissed for failure to file a transcript within forty days after the taking of the appeal, where it appears that the settlement of a bill of exceptions to be used upon the appeal is pending and undetermined, and there is no counter showing that the right of the appellant to have the bill of exceptions settled has not been kept alive.

ID.—APPEALABLE ORDER—REFUSAL TO RESTRAIN SHERIFF FROM EXECUTING WRIT OF ASSISTANCE, GRANTED EX PARTE.—An order refusing a motion of persons in possession of lands sold under foreclosure of a mortgage, who were not notified of an *ex parte* order granting a writ of assistance to a purchaser at the sale, to restrain the sheriff from executing the writ, is appealable as an order made after final judgment; and the fact that the motion was in effect a motion to vacate the order granting the writ and to recall the writ, will not justify the dismissal of the appeal from the order refusing the motion.

ID.—REFUSAL TO VACATE ORDER, WHEN APPEALABLE.—It is only when a party aggrieved has already had an opportunity to appeal from an original order that he cannot appeal from an order refusing to vacate it; but the reason of this rule does not apply where no appeal could be taken from the first order, or when such an appeal would be vain for lack of a record showing the rights of the aggrieved party; and where the first order was made *ex parte*, the right to move to vacate the order, and to show cause against it is implied, and the only appeal which can avail is an appeal from the order refusing to vacate the first order.

ID.—FAILURE TO GIVE UNDERTAKING—GROUNDS OF MOTION TO DISMISS. The failure to give an undertaking upon an appeal from an order will not be considered upon a motion to dismiss the appeal, which does not assign such failure as one of the grounds of the motion.

MOTION in the Supreme Court to dismiss an appeal from a judgment of the Superior Court of the City and County of San Francisco, and also to dismiss an appeal from an order refusing to restrain the sheriff from executing a writ of assistance. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Sullivan & Sullivan, for Respondent.

Walter J. Thompson, for Appellants.

TEMPLE, J.—This is a motion to dismiss the appeal of George W. Burnett and Annie Frances Burnett from the final judgment and also from an order refusing to vacate an order for a writ of assistance.

The action was for the foreclosure of a mortgage, and one William Nicol was a codefendant with the appellants. Nicol appeared in the action, and set up his claim to a lien subsequent to the lien of the plaintiff. Judgment was entered August 21, 1896. The appeal was taken July 31, 1897.

A sale of the mortgaged premises under the decree had taken place in November, 1896, at which the plaintiff was the purchaser. Thereafter, and until the eleventh day of June, 1897—according to the verified statements of the appellant—the sheriff refused to issue a certificate of sale or to record a duplicate, and also refused to furnish appellants with the necessary data to enable them to redeem the premises from said sale. They also assert that the property was worth much more than was realized from said sale, and that they were ready and desirous of effecting a redemption.

The premises not having been redeemed, the sheriff, on the 26th of June, 1897, executed and delivered to the plaintiff a deed, and thereafter, on the 8th of July, 1897, a writ of assistance was issued, requiring the sheriff to put the purchaser in possession. Subsequently, appellants obtained an order to show cause on the 23d of July, 1897, why the sheriff should not be restrained from executing the writ. July 30, 1897, the court refused the order applied for. The appeal from the judgment and from the order above recited was taken on the 31st of July, 1897.

The grounds of the motion are: 1. The notice of appeal was not served upon defendant Nicol. This point was abandoned at the argument; 2. The notice of appeal was not served and filed within six months after the entry of judgment; 3. The transcript on appeal was not served and filed as required by the rules of the court; and 4. The order is not an appealable order.

At the time the judgment was entered an appeal could be taken from a final judgment at any time within one year after its entry. March 3, 1897, section 939 of the Code of Civil Procedure was so amended as to give only six months after the entry of judgment within which an appeal can be taken. At the time

of the amendment the period of six months had already elapsed since the entry of the judgment; there remained, however, five months of the time allowed for taking an appeal under the code before the amendment. The act took effect sixty days after its passage, at which time nine months had elapsed since the entry of judgment. The appeal was taken after that time, but within the period of twelve months from the entry of judgment.

If the amendment operated retrospectively, it cut off the right of appeal immediately upon the taking effect of the act, affording no opportunity whatever thereafter for the exercise of this privilege, and depriving this court, so far as the legislature can, of its jurisdiction in the cases upon which it would so operate.

To make this statute applicable to judgments entered before it went into effect is to give it a retroactive effect. But it is no objection to the validity of a statute to say that it is retrospective in its operation. The question is, Is the amendment an *ex post facto* law, or does it impair the obligation of contracts? and also, perhaps, whether it deprives anyone of vested rights. If it does none of these things, it is no objection to it that it applies to pending cases or past transactions.

Laws which create new obligations, or impose new duties, or exact new penalties because of past transactions, have been universally reprobated by civil and common law writers, and it is to be presumed that no statute is intended to have such effect unless the contrary clearly appears. This is especially so where to give the statute retrospective effect would work manifest injustice. Existing laws, it is said, enter into and become part and parcel of contracts to which they are applicable. How obvious it is, therefore, that all should be able to contract obligations with knowledge of the laws which thus enter into them.

It is quite obvious that great hardship is likely to result if a retroactive effect is given to this statute. One may be presumed to know the laws of the land, but the very instant this amendment took effect, if it be retroactive, the right of appeal was cut off at once. No time whatever was given to appeal in those cases in which judgments had been entered six months or more previously. Unless it is absolutely necessary, we should not impute such an intention to the legislature. In view of the con-

struction which has almost invariably been given to statutes of this character, I feel sure that the legislature intended that its operation should be limited to judgments thereafter entered.

The motion to dismiss the appeal from the judgment is also based upon the fact that no transcript on appeal was filed in this court, and that more than forty days have elapsed since said appeal was taken. In reply, the appellants filed an affidavit showing that the appeal was taken on the 31st of July, 1897, and: "That thereafter, and in due time as provided by law, these appellants (this affiant and the other defendant, Annie F. Burnett) prepared and served on the respondent's attorney a bill of exceptions to be used on the appeal from said order and judgment, and thereafter and in due time the respondent's attorneys served their amendments to the said proposed bill of exceptions, and thereafter the said amendments were refused by the appellants, and the said proposed bill of exceptions, with the said amendments, were left with the judge for settlement, and are not yet settled or allowed by the said judge, and the transcript cannot be filed until the same have been settled."

There is no counter-showing, and although a bill of exceptions upon appeal, from the order simply, could not be used on the appeal from the judgment, it is in the nature of things possible that the right of the defendants to have a bill of exceptions on the appeal from the judgment has been kept alive until the present time, and, in view of the uncontradicted affidavit, we must presume it was done. In the moving papers it is merely shown that no bill of exceptions or statement on appeal has ever been settled.

The contention that the order refusing to restrain the sheriff from executing the writ is not appealable certainly finds warrant in numerous decisions of this court. In effect, the motion was to vacate the order for the writ and to recall the writ.

Henly v. Hastings, 3 Cal. 341, seems to be the first in this line of decisions. An *ex parte* order had been made striking out a marginal entry of satisfaction of a judgment. The appeal was from an order refusing to vacate this order. The court said the first order was wrong, and the refusal to alter it any number of times would not make it less so. The appeal should have been from

the first order and not from a mere determination of the court to abide by it.

The next two cases upon the subject were *People v. Grant*, 45 Cal. 97, and *San Jose v. Fulton*, 45 Cal. 316. In both of these cases the court declined to follow *Henly v. Hastings*, *supra*, but attempted to discriminate the cases. In the first it was said that the rule could not apply where the party appealing from the second order could not have appealed from the first. Therefore, where a person not a party to the suit is purchaser, and his grantee obtains a writ of assistance, the person who had been ejected, but who contended that he was not in privity with the defendant in the suit, could move to vacate the writ, and appeal from an order denying his application. It is obvious that this appellant did not really move to vacate the order, but to be restored to possession as one improperly ejected. The writ did not run against him.

In *San Jose v. Fulton*, *supra*, the defendant in the action moved to vacate the order allowing the writ, which had been issued *ex parte* upon the application of the grantee of the original purchaser. The court held the grantee of the purchaser to be a mere intruder, and, therefore, the writ was irregularly issued, and, therefore, the defendant may not have had notice "for in the absence of notice of the application actually given, a party is not held to knowledge of the entry of an order obtained by one who is not already a recognized adversary in the case." And, as he might not know of the order until it would be too late to appeal from the first order, the case is made an exception.

The hardship of such an application of the rule is apparent, but I fail to see that the writ was irregularly issued or that it was issued at the instance of an intruder.

It is not expected that the purchaser at such a sale will be adverse party in the case. Indeed, it has been thought that he cannot purchase without special provision to that effect in the decree. If the grantee of the original purchaser is entitled to the writ at all, he is in no sense an intruder. The simple fact is, that the court found that the rule would operate unjustly and refused to enforce it. The court recognized the fact that to enforce such a rule, in that case, would be practically to deny an appeal, and it would often amount to the same thing if the party

injured is compelled to appeal from an *ex parte* order where, having no opportunity to make a showing, he cannot present his case to the appellant tribunal; and frequently, too, he would have no notice of the order until it is too late to appeal. In *Henly v. Hastings, supra*, the defendant may have paid the judgment, and, having seen that satisfaction was duly entered, his case was ended. He was not bound to watch for further proceedings, nor was he presumed to have notice of the *ex parte* restoration of the judgment.

The appellate jurisdiction comes from the constitution and not from the statute. The statute procedure, however, recognizes fully the right of appeal when it provides that all orders made before judgment may be reviewed on appeal from the judgment, and all special orders after judgment are themselves appealable. The order appealed from is a special order made after judgment and comes within the terms of the statute. So, also, did the orders involved in the cases relied upon by the respondent. The only possible reason for refusing to entertain appeals in those cases was that the party aggrieved had already had an opportunity to appeal from the same ruling, and cannot extend his time for taking an appeal by making the court repeat its ruling. But the reasons cannot apply where no appeal could be taken from the first order, or when such an appeal would be vain for lack of a record showing the rights of the aggrieved party. The cases above cited from 45 California are made exceptions to the rule on that ground, and these cases are approved in *Green v. Hebbard*, 95 Cal. 39.

As to every order finally disposing of the rights of the parties, as to any matter involved in the litigation—orders, final in the sense that the question cannot be again considered in the case—the parties affected have a right to be heard.

When they are made *ex parte*, the right to move to vacate the order, and upon such motion to show cause against the order, is implied. In such case, the only appeal which can avail is an appeal from the order refusing to vacate. In no other way, where evidence is submitted, can the appellant present to this court his showing against the order. To say he cannot do this is to deny him his right of appeal.

With the general rule laid down in the numerous cases cited

by respondent I have no quarrel. Exceptions to the rule have heretofore been made, and this case falls within the reason of those exceptions. It must be admitted that this court has not always properly discriminated between the cases which are within the rule and those which are not. They will not justify us, however, in refusing to appellant a right secured to him by the constitution and the statute.

It is said that no undertaking was given on the appeal from the order. The failure to give an undertaking was not one of the grounds of the motion, and cannot now be considered.

The motion is denied.

Beatty, C. J., Harrison, J., and Garoutte, J., concurred.

McFarland, J., concurred in the order.

[L. A. No. 257. Department Two.—December 3, 1897.]

CITY OF LOS ANGELES, Respondent, v. WILLIAM LEAVIS et al., Defendants. JOHN H. REYNOLDS et al., Appellants.

EMINENT DOMAIN—CONDEMNATION OF LAND FOR PUBLIC STREET—POWER OF MUNICIPAL CORPORATION—STATUTORY CONSTRUCTION.—The provisions of the act of March 6, 1889, relative to the laying out, opening, extending, widening and straightening of public streets in municipalities are not exclusive, and were not designed to prohibit a municipality from maintaining proceedings to condemn land for a public street under the provisions of part III, title VII, of the Code of Civil Procedure; and a municipal corporation has power to institute such proceedings under the code, where it has funds in the treasury available for the proposed condemnation and opening of the street, without resort first had to the method provided in the act of March 6, 1889.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order striking out a cost bill, and from an order denying a new trial. J. W. McKinley, Judge.

The facts are stated in the opinion of the court

Will D. Gould, for Appellants.

W. E. Dunn, and Albert Crutcher, for Respondent.

HENSHAW, J.—The city of Los Angeles brought suit to condemn land for a public street. Judgment passed for plaintiff, and from this judgment and from the order denying defendants' motion for a new trial defendants appeal.

The city instituted its action under the provisions of part III, title VII, of the Code of Civil Procedure. Before the commencement of the suit it had not resorted to the steps and processes contemplated by the statute of March 6, 1889, relative to the laying out, opening, extending, widening, and straightening of public streets in municipalities. (Stats. 1889, p. 70.)

The single proposition here advanced by appellant is, that the city had no power or authority to commence or maintain this action without resort first had to the method provided in this statute.

This contention we think is untenable. The provisions of the act of March 6, 1889, are not exclusive, and were not designed to prohibit a municipality from maintaining condemnation proceedings under the provisions of the Code of Civil Procedure. It may and will usually happen that a municipality proposing to open a new street will adopt the machinery provided for by the statute, if for no other reason than that it contemplates the formation of an assessment district, and the imposition of the cost of the opening of the street upon the property of that district. But, upon the other hand, if it shall happen that a municipality has in its treasury funds available for the proposed condemnation and opening of a street, no good reason can be seen why it should not pay these expenses out of its treasury and relieve property owners of the unnecessary burden of taxation. In *Pasadena v. Stimson*, 91 Cal. 238, the court, after quoting section 1001 of the Civil Code, wherein it is provided that any person may, without further legislative action acquire private property for any use specified in section 1238 of the Code of Civil Procedure, declared: "A corporation, whether private or public, is a person. It follows, therefore, that under this general law, general in the widest and fullest sense of the term, any public or private corporation, or any natural person, may, for any of the uses defined in section 1238 of the Code of Civil Procedure, acquire property, without the consent of the owner, by means of the proceedings

described in part III, title VII, of said code." In *Santa Cruz v. Enright*, 95 Cal. 105, the same construction is given to the law.

The judgment and orders appealed from are therefore affirmed.

Temple, J., and McFarland, J., concurred.

[Crim. No. 253. Department Two.—December 3, 1897.]

THE PEOPLE, Respondent, v. RANSOM ELLENWOOD, Appellant.

CRIMINAL LAW—MAKING FICTITIOUS CHECK—PLEADING — SUFFICIENCY OF INFORMATION—NONEXISTENCE OF PRETENDED MAKER—UNCERTAINTY—WAIVER OF OBJECTION.—An information charging the defendant with making and forging a fictitious check, payable to his order, and indorsing the same with intent to defraud a person named "whereas in truth and in fact there was and is no such bank, corporation, copartnership, or individual," as the assumed maker of the check, as defendant "then and there well knew, and that the said instrument was fictitious," sufficiently states a public offense; and the most that can properly be said in reference to the question as to what time the expression "was and is" relates is that that expression is lacking in the requisite certainty, but such objection can only be taken by demurrer, and when not so taken is waived, and cannot avail the defendant upon appeal from the judgment.

ID.—SECOND COUNT IN INFORMATION—JOINDER OF OFFENSES — REFERENCE TO FIRST COUNT NOT PERMISSIBLE.—An information which in fact contains two counts, should charge the defendant in the second count as if he had committed a distinct offense, it being upon the principle of the joinder of offenses that the joinder of counts is admitted; and such information cannot omit material allegations and import them from the first count by referring to them by the use of the word "said."

ID.—CHARGE OF MAKING AND PASSING FICTITIOUS NOTE IN ONE COUNT. Although either the making or the passing of a fictitious check with intent to defraud the same person would constitute an offense under section 476 of the Penal Code; yet when referring to the same instrument, and charging the same intent they constitute but one offense, and may be properly charged in a single count; and in such case there is neither necessity nor propriety in repeating the allegations of the making of the check, and of the nonexistence of the fictitious person whose name is signed to the check in connection with the allegation of the passing of the check.

ID.—IMPROPER INSTRUCTION—INCORRECT STATEMENT OF EVIDENCE—UNAUTHORIZED CONCLUSION OF FACT.—Where the defendant testified

that he met Dalton, the maker of the note, in San Francisco, had known him in Los Angeles, and that he resided in New York; evidence for the prosecution that his name was not in the directory of San Francisco, and the testimony of a policeman that the defendant told him that there was no such man in San Francisco, are consistent with the testimony of the defendant; and a statement in the charge of the court referring to the testimony of the policeman, that the prosecution, "have brought here a witness who undertakes to tell you that the defendant admitted to him that Dalton was a mere fiction," is not a statement of the evidence, but of an unauthorized conclusion of fact drawn by the court from the evidence, and is in violation of the constitutional provision that "judges shall not charge juries with respect to matters of fact."

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William T. Wallace, Judge.

The facts are stated in the opinion.

J. N. E. Wilson, and George D. Collins, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

HAYNES, C.—Defendant Ellenwood was tried upon an information charging him with making and passing a fictitious check with intent to defraud one James H. Doolittle, was found guilty as charged, and sentenced to imprisonment at San Quentin for fourteen years, and he appeals from said judgment and an order denying his motion for a new trial.

Appellant contends that the information upon which he was tried is insufficient in law. Counsel treats it as containing two counts, the first for making a fictitious check upon the Bank of California for the sum of one hundred dollars, payable to the order of Ransom Ellenwood, the appellant, and signed "F. S. Dalton," with intent to defraud James H. Doolittle; and the second count for passing it to said Doolittle with like intent. As to the first count, it is contended that the allegation of the non-existence of F. S. Dalton is insufficient, and, as to the second count, that it altogether omits to allege the nonexistence of Dalton, and that if it charges anything it charges the uttering of a forged instrument under section 470 of the Penal Code.

The first count, after alleging that on the thirteenth day of

June, 1896, the defendant, with intent to defraud Doolittle, did make and forge a certain fictitious instrument in writing for the payment of money purporting to be signed by one F. S. Dalton, and payable to the order of the defendant, and charging defendant with its indorsement, alleged as follows:

"Whereas, in truth and in fact, there was and is no such bank, corporation, copartnership, or individual as F. S. Dalton in existence, as he, the said Ransom Ellenwood, then and there well knew, and that the said instrument in writing was fictitious."

The question is, To what time does the expression "was and is" relate?

The most that can properly be said is, that it lacks that certainty and directness which is required by section 952 of the Penal Code; but, as it states a public offense, the objection can only be taken by demurrer, and when not so taken, it is waived. (Pen. Code, secs. 1004, 1012.) It can, therefore, not avail the defendant upon this appeal. (*People v. Bryon*, 103 Cal. 677.)

It is also contended on behalf of appellant that the second count, charging that he uttered said fictitious check, is insufficient, because said second count does not allege the nonexistence of Dalton. The allegation is: "And the said Ransom Ellenwood, well knowing the said instrument to be forged and false and fictitious, did then and there," etc.

If the information in fact contained two counts, the second is fatally defective, since material allegations made in the first count cannot be imported into a second or other count by referring to them by the use of the word "said"; though in a second count the formal commencement is generally abbreviated to read: "The jurors aforesaid on their oaths aforesaid do further present"; but, as a rule, any count from which the commencement or the statutory conclusion is omitted is bad. (Bishop's New Criminal Procedure, sec. 429.) "Every separate count should charge the defendant as if he had committed a distinct offense, because it is upon the principle of the joinder of offenses that the joinder of counts is admitted." (Bishop's New Criminal Procedure, sec. 426.)

But in fact the information contains but one count, and there was neither necessity for nor propriety in repeating the allegation of the nonexistence of Dalton or the making of the check, though

either the making or the passing with intent to defraud the same person would constitute an offense under section 476 of the Penal Code; yet both, when referring to the same instrument and charging the same intent, constitute but one offense and may be properly charged in a single count. (*People v. Frank*, 28 Cal. 513; *People v. Harrold*, 84 Cal. 567; *People v. Gusti*, 113 Cal. 179.)

Several parts of the instructions given to the jury are urged as grounds for reversal. These principally relate to the ever recurring question as to whether they violate the constitutional provision that: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." (Const., art. VI, sec. 19.)

An outline of the evidence is necessary to a proper understanding of these objections. On the part of the prosecution three witnesses were called. Mr. Doolittle testified that defendant had roomed and boarded with him many months, and always seemed to have plenty of money and paid his bills regularly until a few months before he left the hotel; that when he left he owed him a balance of twenty-seven dollars; that on June 13th defendant called and passed to him the check in question, that he paid him seventy-three dollars, the difference between the face of the check and the board bill; that on Monday he presented the check at the bank and payment was refused; that some time afterward defendant paid him back the seventy-three dollars, but he thought it was after defendant was arrested.

A bookkeeper from the Bank of California testified that at no time during the last ten years was there any account in the name of F. S. Dalton.

Ross Whitaker, a detective police officer, testified that he arrested the defendant; that there is no such name as F. S. Dalton in the San Francisco directory for 1896; that he had a short conversation with defendant when he arrested him, in which defendant told witness: "There is no such man here as F. S. Dalton."

The defendant testified that on Saturday, June 13th, about noon, he stopped in at the Palace Hotel, and met an old friend, Mr. F. S. Dalton, who was temporarily in the city; that he knew him in 1895 in Los Angeles, and that Dalton is a resident of New York; that he had luncheon with Dalton at the Palace

grillroom, where they remained for an hour or so; that Dalton told him it was his intention to go away, and asked witness if he could cash a check for him on the Bank of California; that it being after banking hours, and knowing the man as he did, and not suspecting that Dalton had no funds in the bank, he cashed the check; that he knew nothing of any trouble about the check for two weeks, when he was arrested, and that as soon as he found there were no funds in the bank he returned to Mr. Doolittle the money he was out.

Appellant contends that the court erred in the following instruction to the jury: "Now, the prosecution has brought here a directory of this city and county; has also brought here a witness who tells you he has searched in vain for such a person as F. S. Dalton; they have brought here a witness who undertakes to tell you that the defendant admitted to him that Dalton was a mere fiction."

It is contended that the last clause of the above sentence violated the constitutional provision that: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." (Const., art. VI, sec. 19.)

The testimony to which the court here referred was given by the police officer who made the arrest. He testified as follows: "When I arrested the defendant, Ellenwood, I had a brief conversation with him in which he told me that there was no such man here as F. S. Dalton."

It might be true that Dalton's name was not in the directory, that the officer searched the city for him in vain, and that no such man was here at the time the statement was made by the defendant to the officer, and yet Dalton be a real person, and that he made the check at the time and under the circumstances detailed by the defendant; but if Dalton had no existence, was "a mere fiction," it could not be true that Dalton made the check, nor that defendant cashed it for him. In short, the statement made by the defendant was consistent with his innocence, while the statement as made by the court was not only inconsistent with his innocence but construed it as a direct admission of guilt. There can be no question that the court referred to the testimony of the policeman, since no other witness testified as to any conversation with the defendant upon the subject.

The statement of the court put a construction upon the language of the witness, and in effect told the jury what the words spoken by the witness meant; that when the defendant said, "there is no such man here as Dalton," it meant that Dalton was a "mere fiction." It was not a statement of the evidence, but of a conclusion of fact drawn by the court from the evidence as given by the witness, a conclusion, too, that neither the court nor the jury could properly draw. Besides, it had a direct tendency to discredit the defendant's testimony, given in his own behalf, that he met Dalton in San Francisco, had known him in Los Angeles, and that he resided in New York; for, if it was true that Dalton was a mere fiction, it could not be true that he ever knew or saw him, or received the check from him, while the statement made to the officer that there was no such person "here" was entirely consistent with the facts to which he testified.

The instruction under consideration will not bear the construction put upon it by counsel for respondent; a construction, by the way, which, taken literally, would impute to the court an intentional disregard of the constitutional provision hereinbefore quoted. For the error above specified the judgment must be reversed.

It is also contended, however, by appellant that the instruction in which the attention of the jury was called to the fact that defendant was on trial, and as to what motives the evidence may disclose the witnesses to have, is erroneous. This instruction, which was given at some length, I think does not go beyond the instruction in *People v. Cronin*, 34 Cal. 191, which has been several times reluctantly followed in later cases; but we would call attention to the recent case of *People v. Van Ewan*, 111 Cal. 149, where this court, by Mr. Justice McFarland, said: "If the question were an entirely open one, we would feel constrained to hold upon principle that any instruction at all as to the credibility of any witness, or the weight to be given to his testimony, is violative of section 19 of article VI of the constitution, which provides that 'judges shall not charge juries with respect to matters of fact,' and section 1887 of the Code of Civil Procedure, which, referring to a witness, provides that the jury are the exclusive judges of his credibility."

In view of the conclusion reached, the point made by counsel

for appellant that the evidence is not sufficient to justify the verdict need not be considered.

The judgment and order appealed from should be reversed and a new trial ordered.

Britt, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial ordered.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 637. Department Two.—December 3, 1897.]

GEORGE WOLTERS, Respondent, v. FREDERICK R. KING et al., Copartners under the Firm Name of Harris & Jones, Appellants.

ACTION FOR LUMBER SOLD AND DELIVERED—SALE OF LAND FOR LUMBER—AGENCY FOR OWNER—CONTRACT FOR BENEFIT OF LUMBER FIRM—SEPARATE AGREEMENTS IN ONE TRANSACTION.—Where a member of a co-partnership engaged in the business of buying and selling lands, acting for the benefit of his firm, and also as agent for the sale of a tract of land, effected a sale of the land in his own name to a corporation engaged in the business of manufacturing lumber near to the land, agreeing that the price fixed should be paid in lumber to be delivered to him at specified rates, and on the same day made a separate agreement with the owner of the land reciting that he had acted as agent of the owner in effecting the sale, and that such owner was to be paid for the lumber by him at the rates specified, each lot delivered to be paid for to the owner at those rates ninety days after delivery, with agreed interest, and that the owner was to sell the lumber to him at those rates, and should pay him a commission for effecting the sale, payable in lumber at the rates fixed, the two agreements are to be considered as parts of one transaction, and as binding the firm for whose benefit they were made, and an action will lie in favor of the owner of the land against such firm for lumber sold and delivered to them under the agreement.

ID.—TIME FOR PAYMENT OF COMMISSION — CONTEMPORANEOUS ORAL AGREEMENT FOR POSTPONEMENT — PAROL EVIDENCE.—Though, as a general rule, a broker or agent for the sale of land for a stipulated commission has earned and is entitled to his commission when he has found a purchaser, able, ready, and willing to take the land at the price and within the time agreed upon, yet where no time for the payment of the commission was definitely agreed upon in the written contract, parol evidence is admissible to show that, contem-

poraneously with the execution of the written agreement, it was orally agreed between the agent and the owner of the land, that the commission, which was to be paid to the agent on lumber, was not to be taken out of the first lumber delivered to him under the contract, but that he was to wait for payment of the commission until all the lumber had been shipped as agreed in the contract, and the owner had received payment for his land.

ID.—LUMBER FIRM BOUND BY ORAL AGREEMENT—APPROPRIATION OF LUMBER FOR COMMISSION—INSUFFICIENT DEFENSE TO ACTION.—Under the circumstances of the case, all of the members of the lumber firm were bound by the terms of the agreement made by one of its members for the benefit of the firm, including the oral agreement made respecting the time for payment of the stipulated commission, and none of them can appropriate the lumber first delivered to them under the contract to the immediate payment of the stipulated commission, or defend an action by the owner of the land against them for the agreed price of such lumber, upon the ground of such appropriation.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion.

Chickering, Thomas & Gregory, for Appellants.

George A. Rankin, for Respondent.

BELCHER, C.—The plaintiff brought this action to recover a sum of money, with interest, alleged to be due for lumber sold and delivered by him to defendants. The answer denied all the averments of the complaint. The court found: "That on the eighth day of November, 1892, the plaintiff, at the instance and request of the defendants, sold and delivered to said defendants lumber of the agreed price and value of one thousand and eighteen dollars and twenty-three cents, for which said defendants promised and agreed to pay to said plaintiff, ninety days after said date, with interest at the rate of eight per cent per annum from and after the expiration of said ninety days." The court further found that no part of the said money had been paid, and that plaintiff was entitled to a judgment therefor.

Judgment was accordingly so entered, from which and from an order denying their motion for a new trial defendants appeal.

It appears that in November, 1892, plaintiff was the owner of five hundred and twelve acres of timber land in Siskiyou county, which he wished to sell. The defendants were copartners, engaged in the business of buying and selling lumber in the city of San Francisco. The Red Cross Lumber Company was a corporation engaged in the business of manufacturing lumber near plaintiff's land, and it wished to purchase said land and pay for it in lumber.

On November 1, 1892, the defendant, M. Harris, in his own name but for the benefit of the firm of Harris & Jones, entered into a written agreement with the Red Cross Lumber Company, by the terms of which he agreed to sell to the lumber company and said company agreed to buy the plaintiff's said land. The agreed purchase price was five thousand one hundred and twenty dollars, payable in lumber to be shipped and delivered to Harris by or before the thirty-first day of December, 1893. The lumber was to be taken in payment according to a schedule fixing different values for different grades of lumber. Upon delivery by the lumber company of sufficient lumber to make up the purchase price of five thousand one hundred and twenty dollars, Harris agreed to execute and deliver to said company a good and sufficient grant, bargain, and sale deed of said land.

On the same day, November 1, 1892, the plaintiff Wolters and the defendant Harris entered into a second written agreement, which, after setting out the substance of the agreement between Harris and the lumber company, and that the title to the lands described therein was actually vested in said Wolters, and that Harris, in contracting for the sale thereof, acted as Wolters' agent, contained the following provisions: 1. That Harris should receive the lumber shipped to him by the Red Cross Lumber Company and pay Wolters for it at the rates mentioned in the agreement between him and the said company; 2. That Wolters should pay Harris the sum of one thousand and twenty-four dollars as a commission for making the sale of the land; 3. That Wolters would sell to Harris all the lumber mentioned or referred to in the agreements at the rates specified therein, and that payment for any shipment made should not be due until the expiration of ninety days after the delivery thereof to Harris in San Francisco, and that upon all payments not made at

the expiration of ninety days Harris should pay interest at the rate of eight per cent per annum; 4. That Harris' commission should be paid in lumber shipped to him by the said lumber company, and to be computed at the rates fixed in the first agreement.

Pursuant to the said agreement three carloads of lumber, of the value of one thousand and eighteen dollars and twenty-three cents (computed at the rates specified), were, during the month of November, 1892, shipped by the Red Cross Lumber Company to San Francisco and were delivered to and accepted by the firm of Harris & Jones. And it was to recover the purchase price of these shipments of lumber that this action was brought.

It will be observed that the two agreements were made at the same time, and were parts of one transaction. And that they were made for the benefit of and are binding on the defendants is not questioned. Counsel say: "So far, however, as the obligations arising under this written agreement are concerned, it is admitted by appellants that they are bound thereby, not because it was in its inception their contract, but because they ratified it and adopted it as their own. They are now and have at all times been willing to stand by the obligations arising out of that instrument."

But the contention is, that the defendants were entitled to appropriate the first lumber received by them to the payment of the commission, and hence the plaintiff cannot maintain this action; and in support of this contention counsel cite section 1657 of the Civil Code, which provides: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained."

It is true the general rule is that a broker, who undertakes to sell another's land at a fixed price and within a given time for a stipulated commission, has earned and is entitled to his commission when he has found a purchaser who is able, ready, and willing to take the land at the price and within the time named.

But it was clearly proved at the trial of this case that, contemporaneously with the execution of the written agreements, it was

orally agreed between Harris and Wolters that the commission was not to be taken out of the first lumber received by Harris, but he was to wait for the payment of his commission until all the lumber had been shipped, the contract completed, and Wolters had received payment for his land. This testimony was all objected to by defendants, but, as no time was definitely fixed in the written agreements for the payment of the commission, it was properly held admissible and received. (*Sivers v. Sivers*, 97 Cal. 518.)

It is earnestly insisted, however, that the defendants, other than Harris, were not bound by the oral agreement, and that the court erred in rendering judgment against them.

Without following the able and quite elaborate arguments of the respective counsel upon this point, we deem it enough to say that, looking at all the facts and circumstances attending the transaction as shown by the record, it must, in our opinion, be held that all the defendants were bound by the oral agreement, and were therefore not entitled to appropriate the lumber involved in this case to the payment of the said commission.

It follows that the judgment and order appealed from should be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 776. Department Two.—December 4, 1897.]

JAMES STANLEY, Administrator, etc., Appellant, v. JAMES W. GILLEN et al., Respondents.

DISMISSAL OF ACTION—WANT OF PROSECUTION—DELAY IN SERVICE OF SUMMONS—DISCRETION—CONSTRUCTION OF CODE.—Subdivision 7 of section 581 of the Code of Civil Procedure, providing that no actions shall be further prosecuted, and all actions shall be dismissed unless summons shall have been issued within one year and shall have been served within three years after the commencement of the action, is not to be construed as meaning that plaintiff may have the full time limited thereby in all cases; but it is still discretion-

ary with the court, as it was prior to the amendment of that section, to dismiss the action for improper delay in the prosecution of it, even though the summons be issued and served within the time limited by the code.

ID.—RULE NOT FIXED OR CERTAIN—QUESTION AS TO ABUSE OF DISCRETION.—There is no fixed or certain rule as to the dismissal of an action for want of prosecution in cases in which the dismissal is not made compulsory by the Code of Civil Procedure; and where there is no dispute as to the facts, the only question is whether there is an abuse of discretion in dismissing the action in view of the particular circumstances of the case. The facts of this case reviewed, and the dismissal held not an abuse of discretion.

APPEAL from a judgment of the Superior Court of Alameda County. John Ellsworth, Judge.

The facts are stated in the opinion.

Stearns & Elliott, for Appellant.

Nye & Kinsell, for Respondent Simeon Stivers.

Thomas C. Huxley, for Respondents Thomas Lial and Mark Lyons.

CHIPMAN, C.—The complaint was filed May 10, 1893. The summons was served on all the defendants except Gillen, who has not been served, on May 4, 1896. On May 5, 1896, defendant Stivers served notice of motion to dismiss the action on the ground of unreasonable delay in the service of the summons and in the prosecution of the action. Defendants Lial and Lyons gave a similar notice, and on June 1, 1896, the court rendered judgment of dismissal as to all the defendants; as to Gillen on the motion of the court. The hearing was upon the papers on file in the action and upon affidavits. Plaintiff appeals from the judgment and upon bill of exceptions.

There is no dispute as to the facts. The only question is whether there was abuse of discretion. Section 581, subdivision 7, of the Code of Civil Procedure provides that no action shall be further prosecuted and all actions shall be dismissed unless summons shall have issued within one year and shall have been served within three years after the commencement of the action. Before this section was amended, the power to dismiss the action for the causes named was wholly discretionary. Now it is com-

pulsory where the summons is not issued within one year and served within three years. The code, however, does not mean that the plaintiff may have the full time in all cases; it is still discretionary with the court to dismiss, as before the amendment, even though summons be issued and served within the time. The cases are numerous illustrating the circumstances under which the discretion, as exercised by the lower court, will be affirmed or reversed, but they furnish no fixed or certain rule, for the obvious reason that no two cases present the same facts. "Each particular case presents its own peculiar features, and no ironclad rule can justly be devised applicable alike to all." (*First Nat. Bank v. Nason*, 115 Cal. 626.)

The showing made by defendants in support of their motion is very brief; it is that plaintiff and defendants served are well acquainted with each other, and reside about three miles apart and have met frequently—Stivers and plaintiff at least monthly; that defendants' residences were well known to plaintiff, and they had resided where they now reside in Alameda county for over twenty years, and that there is no good reason why they were not sooner served with summons. They do not deny knowledge of the pendency of the action, and it is deposed, upon information and belief, that defendant Stivers "knew that said action had been brought," but no similar statement is made as to the other defendants. The motion was opposed by the affidavit of one R. F. Marshall, who claims upon information to be an heir at law of plaintiff's intestate and her deceased husband, Earl Marshall, who died intestate in said county. One of the plaintiff's attorneys also makes affidavit. The complaint charges fraud and undue influence on the part of defendants resorted to by them to compass the conveyance, without consideration, to them of certain real property belonging to said Earl Marshall in his lifetime. The complaint goes back to the year 1828, when defendant Stivers, as a child of three years, was taken into Marshall's family and thence to manhood was supported by Marshall and treated as one of the family; it avers how Stivers gradually attained undue influence over his foster parent; how in 1865 Marshall became converted to Mormonism, how in 1879 Gillen came upon the scene and by reason of his religious fellowship with Marshall was able to and did assist Stivers in his design

upon Marshall's property, which was fully accomplished before Marshall's death in 1881. It is alleged on information and belief that Marshall's surviving widow was crazy; that Stivers administered on Marshall's estate to further carry out his fraudulent purpose; that a small amount of property only was inventoried and that was set apart to the widow; that the widow died in 1888; that no administration of her estate was undertaken until, in 1893, when the public administrator, at the request of said R. F. Marshall, who claims to act as the agent of a large number of nonresident heirs, took out letters on her estate. Marshall states in his affidavit that the public administrator declines to advance any money in the litigation, the purpose of the action being to call Stivers to account and to subject the property by him fraudulently taken from Marshall to administration; that he did not sooner serve defendants because he wanted to learn the whereabouts of Gillen before serving anybody, lest a knowledge of the action would come to Gillen and he would avoid being called as a witness; that he had done much corresponding to find Gillen without avail; that the case required much preparation and investigation; that there were many heirs who had to be corresponded with; that they were poor and widely scattered, and he had been unable to get the funds necessary to prosecute the action; that another reason for not serving the resident defendants was that they were at hand and could be served at any time, and that knowing of the pendency of the action they could have appeared voluntarily had they so desired and had the action pressed to trial.

This brief outline of the complaint is sufficient to show the importance of the action to defendants, who must now be quite advanced in years. Stivers was three years old in 1828 and must now be seventy-two years old. The fraudulent acts alleged involve transactions many years back. In justice to defendants, they should have been brought promptly into court and given an opportunity to meet these grave charges. As to the excuses offered for not having done so, we think the court was warranted in holding them to be of little weight. They would have appealed with more effect if made and supported upon motion for a continuance of the trial after issues framed. We cannot see any good excuse for the delay arising from Marshall's desire to keep

the fact of the pendency of the action from Gillen. There is nothing in the showing to justify the belief that the case could be brought to trial within any reasonable time; it is not stated that a single witness has been found to sustain the allegations of fraud in the complaint, all of which are stated on information or belief; it appears that the agent of the alleged heirs has no funds with which to prosecute the action; that he "was compelled to effect an organization amongst said heirs for the purpose of getting funds for the prosecution of the suit," but the funds are not yet forthcoming and the organization is still in embryo. Marshall states that Gillen is a necessary party to the action, but the time within which he could be served expired before the motion was heard, and the alleged purpose of the delay can no longer be accomplished.

It seems quite clear to our minds that the learned judge did not abuse the discretionary power given him, and that the judgment of dismissal should be affirmed.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment of dismissal is affirmed.

Henshaw, J., McFarland, J., Temple, J.

[L. A. No. 303. Department Two.—December 6, 1897.]

S. F. DENISON et al., Respondents, v. ARNOLD BURRELL et al., Appellants.

MECHANICS' LIENS—BUILDING CONTRACT UNDER ONE THOUSAND DOLLARS—RIGHTS OF CONTRACTING PARTIES—CONSTRUCTION OF CODE. Where the contract price for the erection of a building is less than one thousand dollars, the provisions of section 1184 of the Code of Civil Procedure, relative to the mode and time of payment, and the withholding of a percentage of the contract price for the benefit of lienholders, are not applicable; and it is permissible for the parties to contract for the payment of the whole amount before the commencement of the work, or after the completion of the building.

ID.—ABANDONMENT OF CONTRACT—COMPLETION OF BUILDING BY OWNER --RIGHTS OF LIEN CLAIMANTS.—The contract for less than one thousand dollars being valid, the liens of mechanics and material

men cannot be claimed for a greater amount than the sum due and unpaid to the contractor; and if nothing was due the contractor at the time of his abandonment of the contract, and he was to be paid by the terms of the contract only upon completion of the building, liens cannot be claimed for a proportional part of the contract price earned at the date of abandonment by the contractor, and if the building is completed by the owner of the building substantially as called for by the contract, the amount available for the liens of those who had furnished labor or materials to the contractor would be only the excess of the contract price remaining in the owner's hands after payment of the cost of completion.

APPEAL from a judgment of the Superior Court of Los Angeles County. J. W. McKinley, Judge.

The facts are stated in the opinion of the court.

Murphy & Gottschalk, and Augustus A. Montano, for Appellants.

Sheldon Borden, E. M. Hanna, and Borden & Carhart, for Respondents.

HENSHAW, J.—This is an appeal from the judgment rendered against defendants in an action for the foreclosure of a materialman's lien. The facts were stipulated, and upon them the court rendered the judgment complained of. The stipulation of facts is under agreement of the parties made a part of the judgment-roll, and may here be considered as the findings upon which the judgment was based. (*Muller v. Rowell*, 110 Cal. 318.)

Defendant Metcalf had entered into a contract with defendant Burrell whereby he agreed to erect a frame cottage for the latter. The price was the sum of seven hundred and sixty dollars, payable, under the terms of the contract, upon the completion of the building by Metcalf and its acceptance by the owner. Metcalf proceeded with the work until the sixteenth day of April, 1895, when he abandoned it. At the time of the abandonment his contract was half completed. Plaintiffs, materialmen, had furnished material to Metcalf to the value of two hundred and forty-three dollars and sixty cents, which material was actually used in the construction of the building. Upon April 20th Burrell served notice upon Metcalf declaring his willingness and ability to per-

form his part of the contract, and calling upon Metcalf to do the same. Metcalf absolutely refused to proceed further with the work, when, upon May 1, 1895, Burrell caused work to be resumed upon the building, and completed it on the first day of June, substantially in the manner called for under the Metcalf contract. In so completing the building he actually and necessarily expended the sum of six hundred and seventy-six dollars. No part of the contract price had been paid by Burrell to Metcalf, as under the terms of that contract the whole amount of seven hundred and sixty dollars was to be paid only upon the completion and acceptance of the building. After the completion of the building, and upon June 8, 1895, Burrell served notice upon plaintiff that there remained in his hands of the contract price the sum of eighty-four dollars, which he was prepared to pay, as the court might direct, to the holders of valid liens. Upon the tenth day of June plaintiffs' lien was filed.

The court adjudged that, as half of the work under the Metcalf contract had been done, there was, measured by the contract price, the sum of three hundred and eighty dollars in the hands of Burrell available for the payment of liens, and decreed a lien in favor of plaintiffs for the amount sued for, with attorney's fees and costs.

The contract price being less than one thousand dollars, the provisions of section 1184 of the Code of Civil Procedure relative to the mode and time of payment, and the withholding of a percentage of the contract price, are not applicable. It was permissible for the parties to contract for the payment of the whole amount to the contractor before the commencement of the work, or, as was done in this case, to contract that payment should not be made until the whole building was completed. (*Kerckhoff-Cuzner etc. Co. v. Cummings*, 86 Cal. 22.) The cases upon which respondent relies, and which he contends oppose this construction, are those of *Dunlop v. Kennedy*, 102 Cal. 443, and *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114, but these cases both had to do with contracts where the price exceeded one thousand dollars, and they are therefore inapplicable.

The contract being valid, it follows and is admitted that plaintiffs' lien could not be for an amount greater than the sum in defendants' hands due and unpaid to the contractor under the

contract at the time of abandonment. But, under the terms of this contract, there was nothing due the contractor until the completion of the building. Defendant Burrell had the undoubted right to proceed with the construction, and to complete it, as he did, substantially as called for by the contract. So doing, the amount available for the liens of those who had furnished materials or labor to the contractor would be only the excess of the contract price remaining in the owner's hands after the payment of the cost of completion. (*Gibson v. Wheeler*, 110 Cal. 243.) The case is in principle exactly what it would have been had the owner, before the filing of the lien, paid to the contractor all of the contract price excepting eighty-two dollars. In such a case, the contract being valid, no lien for a greater amount could be permitted. (*Wiggins v. Bridge*, 70 Cal. 437.)

The judgment appealed from is reversed and the cause remanded.

McFarland, J., and Temple, J., concurred.

Hearing in Bank denied.

[L. A. No. 110. In Bank.—December 6, 1897.]

MARY M. SMITH, Respondent, v. NELSON SMITH, Appellant.

MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS—ERRORS OF LAW—SPECIFICATIONS.—Where a motion for a new trial is based upon a bill of exceptions no specifications of errors of law are required, in order to secure their consideration by the trial court or by the appellate court.

ID.—REVIEW UPON APPEAL—ERRORS WITHOUT PREJUDICE.—A judgment will not be reversed for mere technical errors of law, which are of too little consequence to be substantially prejudicial.

DIVORCE—EXTREME CRUELTY—GRIEVOUS MENTAL SUFFERING—ANNOYING CONDUCT—VILE EPITHETS—IMPAIRMENT OF HEALTH—PLEADING—FINDINGS—SUFFICIENCY OF EVIDENCE.—In an action for divorce upon the ground of extreme cruelty of the defendant in causing grievous mental suffering to the plaintiff, by an annoying course of conduct, and by the use of vile and indecent epithets, and charges of unchastity, it is not necessary to allege or show that impairment of health resulted from the conduct of the defendant toward the plaintiff; and where there was evidence tending to sustain the

allegations of the complaint as to the acts and probative facts of cruelty causing the grievous mental suffering alleged, and the court found that they were committed by the defendant, and that defendant, by his conduct, willfully inflicted upon plaintiff grievous mental pain and suffering, "thereby greatly impairing her health," the finding as to the impairment of plaintiff's health is unnecessary, and it is immaterial whether that part of the finding was or was not justified by the evidence.

ID.—CONDONATION OF CRUELTY—QUESTION OF FACT—FINDING.—

Whether a cruel and offensive course of conduct has been condoned is a question of fact; and a finding that the acts of cruelty committed by the defendant have never been condoned by the plaintiff is a finding of fact, and not of a conclusion of law; and it is unnecessary and improper that the finding should set forth any acts or declarations bearing as evidence upon the fact of condonation.

ID.—EXPRESS AGREEMENT TO CONDONE REQUIRED—MERE COHABITATION AND RESTORATION TO MARITAL RIGHTS INSUFFICIENT.—

Under section 118 of the Civil Code, a course of offensive or cruel conduct constituting a cause of divorce, cannot be condoned by mere cohabitation, or passive endurance, or conjugal kindness, unless accompanied by an express agreement to condone; and an answer alleging that the plaintiff freely cohabited with the defendant, and restored him to his marital rights, without alleging that these acts were accompanied by an express agreement to condone, does not raise an issue of condonation.

ID.—CONCLUSIONS OF LAW.—

It is not necessary to insert in the conclusions of law in an action for divorce on the ground of extreme cruelty that defendant has been guilty of extreme cruelty toward plaintiff, or that plaintiff has not been guilty of extreme cruelty toward the defendant, or that plaintiff has never condoned the acts of extreme cruelty on the part of the defendant; but it is sufficient to state as a general conclusion of law that plaintiff is entitled to a decree dissolving the bonds of matrimony heretofore existing between the plaintiff and the defendant, and decreeing plaintiff and defendant each to be forever absolutely released from the bonds of matrimony and all the obligations arising therefrom, with such other specific conclusions as relate to the custody of the children, the division of the community property, etc.

ID.—INSUFFICIENT RECRIMINATION—OMISSION TO FIND IMMATERIAL.—

When the facts averred by way of recrimination in the answer of the defendant are insufficient to authorize or justify a decree of divorce in his favor, if he had sued thereupon, and the evidence fails to disclose such facts as would justify the conclusion that they constituted extreme cruelty on the part of the plaintiff, as defined by the Civil Code, the omission to find upon the recriminatory matter in the answer is immaterial, and is not ground for reversal.

ID.—CORROBORATION OF PLAINTIFF'S TESTIMONY.—

The principal object of the rule requiring corroboration of the evidence of the plaintiff is to prevent collusion; and where it is clear that there is no cor-

lusion and the defendant's testimony, though conflicting with that of the plaintiff in many of its details, in the more important matters was corroborative of the plaintiff's testimony, which was also corroborated in certain respects by other testimony, the corroboration is sufficient.

ID.—MOTION FOR NEW TRIAL—NEWLY DISCOVERED EVIDENCE—LETTERS FROM PLAINTIFF—CONDONATION—INSUFFICIENT SHOWING.—Alleged newly discovered evidence of a letter from the plaintiff to the defendant, claimed to be evidence of condonation, a copy of which was proved at the trial to be in the possession of plaintiff, and of which defendant might then have requested the production, and, if not produced, might have applied for postponement of the trial for a reasonable time to enable him to find the original, is not ground for a new trial, and especially not where it appears that the letter, at most, was only evidence of conjugal kindness, and did not tend to show an express agreement to condone the offensive course of conduct of the defendant.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. J. W. McKinley, Judge.

The facts are stated in the opinion rendered in Department Two.

Isidore B. Dockweiler, and J. Brousseau, for Appellant.

J. G. Rossiter, for Respondent.

McFARLAND, J.—When this case was in Department the judgment and order appealed from were affirmed upon an opinion prepared by Mr. Commissioner Haynes. After further consideration, we are satisfied with the conclusion there reached, and with the opinion then delivered as to the points therein discussed. But the appeal was inadvertently considered as though the motion for a new trial had been based upon a statement of the case, and certain rulings as to the admissibility of evidence were not considered because not included in the specifications of errors. As a fact, however, the part of the transcript which contains the evidence and rulings, although substantially a statement, is designated as a "bill of exceptions," and in such case, under the code and former decisions, no specifications of errors of law are required. When this inadvertence was called to the attention of the court by the appellant, in a petition for a

hearing in Bank, the petition was granted. Counsel for appellant were, therefore, not in fault in not specifying the alleged errors. The only additional questions to be considered are whether or not the court below committed a reversible error in either of the rulings referred to in points "third," "fourth," "fifth," "sixth," "seventh," "eighth," "ninth" and "tenth" of appellant's opening brief. The case was tried by the court sitting without a jury. We have examined the alleged errors complained of in the points above mentioned, and we do not consider it necessary to discuss them in detail. Most of the rulings complained of were correct; and if any of them could be considered as technically erroneous they are of too little consequence to be in any substantial sense prejudicial errors which would warrant a reversal of the judgment.

The judgment and order appealed from are affirmed.

Harrison, J., Van Fleet, J., Garoutte, J., and Henshaw, J., concurred.

The following is the opinion of Mr. Commissioner Haynes, approved April 30, 1897, in Department Two:

HAYNES, C.—This appeal is from a judgment of divorce granted the plaintiff, and from an order denying defendant's motion for a new trial, based upon the insufficiency of the evidence to justify certain findings and also upon an affidavit of alleged newly discovered evidence.

The notice of intention to move for a new trial also specified as one of grounds of said motion: "Errors in law occurring at the trial and excepted to by the defendant." The statement as settled shows a large number of rulings upon the admission of evidence, which were excepted to by the defendant; but none of these rulings are specified as errors in the specifications upon which the motion for a new trial was heard, and therefore cannot be considered. (Code Civ. Proc., sec. 659; *People v. Central Pac. R. R. Co.*, 43 Cal. 398; *Bagnall v. Roach*, 76 Cal. 106; *Bohnert v. Bohnert*, 95 Cal. 445.) The fact that counsel for the respective parties discuss these various rulings in their briefs does not authorize this court to consider them. The presumption is, that they were disregarded by the court below in passing upon the

motion. (Code Civ. Proc., sec. 659, subd. 3; *Pico v. Cohn*, 67 Cal. 258.)

The ground of divorce alleged by the plaintiff is extreme cruelty. Defendant, in addition to denials, pleaded condonation, and by way of recrimination, but without seeking for a divorce against the plaintiff, charged that the plaintiff was guilty of extreme cruelty toward him.

The principal question made is that the third finding is not justified by the evidence. This finding, after reciting the principal probative facts charged in the complaint, and finding that they were committed by defendant, concluded as follows: "And the court finds that defendant, by his conduct toward the plaintiff as aforesaid, did willfully inflict upon plaintiff grievous mental pain and suffering, thereby greatly impairing her health."

It is specified that the finding that plaintiff's health was greatly impaired is not justified by the evidence, and a like specification is made to the several findings of probative facts upon which is based the finding that grievous mental pain and suffering was inflicted by the defendant.

Whether plaintiff's health was impaired or not it was not necessary to find. If it was in fact greatly impaired, and such impairment was shown to be the result of defendant's treatment, it would tend to characterize such treatment as extreme cruelty; but, in order to justify a finding of extreme cruelty, it is not necessary that such impairment of health is shown to have resulted, nor is it necessary to be alleged in the complaint. (*Barnes v. Barnes*, 95 Cal. 171.) The sufficiency of the finding would not be affected if the words "thereby greatly impairing her health" had been omitted, and therefore we need not inquire whether the evidence justified that part of the finding. As to the essential part of this finding, it is only necessary to say that there was evidence given by and on behalf of the plaintiff to the effect that without sufficient provocation on the part of the plaintiff, and without any reasonable grounds therefor, the defendant called plaintiff a whore, a hog, and a hypocrite, that she was untrue to him, that he accused her when she was ill of having contracted her disease by illicit intercourse with other men while she was absent visiting her parents in Illinois, it not appearing that such illness was of a character indicating such origin, and that it

was repeated after he had visited a physician with her and was told by the doctor that it was not of that character.

Defendant in his answer admitted that he did at one time charge her with having so contracted said illness, but that that was more than seven years ago. The plaintiff testified, however, that it was repeated on September 12, 1893, about six weeks before this suit was commenced; that defendant then said: "I didn't believe those insinuations at the time, but because you get so excited now I believe them." It will be observed that while the defendant in his answer admitted that seven years before he did charge the plaintiff with having contracted her illness by illicit intercourse, he did disavow a present belief in the truth of the charge.

Much of the testimony was seriously conflicting; but there was evidence, apparently credible, sufficient to support the finding of extreme cruelty, and which the trial court, charged with the duty of determining the credibility of the witnesses and the weight of the evidence, found to be true. It may here be added that the life of these parties had been unhappy for many years, and there are in the complaint several minor allegations of particular acts of alleged cruelty committed by the husband, and many of these are included in the third finding, and found to be true, and these several findings are attacked and argued by appellant. These need not be specially noticed, since if not justified by the evidence it would not affect the sufficiency of the finding in the particulars we have noticed, though we find evidence tending to sustain each of them.

It is also contended that there is no finding upon the plea of condonation tendered by the defendant. The court found that said acts of cruelty have never been condoned by the plaintiff; but this, counsel say, is only a conclusion of law. Counsel are mistaken. Whether an offense has been condoned is a question of fact. Being an operation of the mind it is evidenced by acts or declarations, but evidence of the existence of a fact has no proper place in a finding. Section 118 of the Civil Code provides: "Where the cause of divorce consists of a course of offensive conduct, or arises in case of cruelty from successive acts of ill-treatment which may aggregately constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not

be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone." It might be sufficient to say upon this point that, if the finding in question is a conclusion of law, the allegation which is supposed to have raised the issue is also a conclusion of law, and therefore raised no issue; for though the answer, in connection with the allegation that plaintiff "condoned said alleged charges of extreme cruelty," also alleged that she "freely cohabited with him and restored him to his marital rights," did not allege that these acts were "accompanied by an express agreement to condone," which the code makes essential.

Appellant in his brief specifies three particulars in which he claims that the findings are sufficient to support the judgment, viz., that "the conclusions of law in said findings fail to specify: 1. That defendant has been guilty of extreme cruelty toward plaintiff; 2. That plaintiff has not been guilty of extreme cruelty toward defendant; and 3. That plaintiff has never condoned the acts of extreme cruelty on the part of the defendant.

The first conclusion of law drawn by the court from the findings is: "That plaintiff is entitled to a decree of this court dissolving the bonds of matrimony heretofore existing between the plaintiff and defendant, and decreeing plaintiff and defendant each to be forever absolutely released from the bonds of matrimony and all the obligations arising therefrom."

The remaining conclusions of law relate to the custody of the children, the division of the community property, etc.

Such conclusion of law as that above quoted was held sufficient in *Murphy v. Snyder*, 67 Cal. 451, and, it may be added, is the more common form in which conclusions of law are stated.

Again, appellant contends that the judgment should be reversed upon the ground that there are no findings upon the charges of extreme cruelty alleged against the plaintiff in defendant's recriminatory answer. Section 122 of the Civil Code is as follows: "Recrimination is a showing by defendant of any cause of divorce against the plaintiff in bar of the plaintiff's cause of divorce." In order to defeat the plaintiff's cause of action, the recriminatory answer must allege facts which, if proved, would authorize or justify a decree of divorce in his favor if he had sued therefor, and the evidence must be sufficient

to sustain such of the allegations of fact as would justify the conclusion that they constituted extreme cruelty as defined by the Civil Code.

If this answer had been presented as a complaint for divorce, and the court had found the several acts and things complained of in the language in which they are alleged, we do not think it would have justified a decree of divorce.

In *White v. White*, 82 Cal. 427, 452, the failure of the trial court to find upon the issue of extreme cruelty pleaded by the defendant in recrimination was considered. The court said: "The court is of opinion that the evidence on this issue was insufficient to have sustained or justified a finding by the court below of extreme cruelty by plaintiff to defendant. . . . As the evidence would not have justified a finding of extreme cruelty on the part of the plaintiff, and as this court would have reversed for such a finding, as not justified by the evidence, if it had been made, it will not reverse for want of such finding and send the cause back for a finding upon such issue."

That on one occasion the plaintiff, under provocation, said: "I don't love you!" whilst always before protesting that she loved him; that concerning the allegation that she had instructed their children that her authority was paramount, the controversy was, in substance, that she wished to educate them in her religious belief, which was different from his. He testified that "one day she came and sat down by my side and threw her arms round my neck and said, 'Nelson, do let me teach the children the Christian religion, and let us get along together.' I couldn't refuse under those circumstances, and I said, 'All right, if we can get along together I will give up that point,'" and that, while it was still a subject of discussion between them, it was almost entirely dropped during the last two years. Nowhere in his evidence did he make the broad assertion charged in his answer. Concerning the allegation that she had refused to cohabit with him, "ever since the twenty-sixth day of October, 1893," it is sufficient to say that the complaint in this action was filed the next day after the date mentioned; nor are any instances of the display of temper or passion given, either in said answer or in the evidence, which would be sufficient to support a finding of extreme cruelty. The allegations that plaintiff is extravagant

and lazy, and neglected her necessary housework, are negatived in the findings.

A point made by appellant, that should have been noticed in another connection, is that plaintiff's testimony relative to the acts of the defendant, which are alleged to constitute cruelty, is not corroborated.

As to what constitutes corroborating evidence in suits for divorce, see *Evans v. Evans*, 41 Cal. 103, 108. It is sufficient to say that defendant's testimony, while conflicting with that of the plaintiff in many of the details, yet in the more important matters was corroborative of the plaintiff's testimony. Other testimony might also be referred to. The principal object of the rule is to prevent collusion, and in this case it is clear there is no collusion.

In support of his motion for a new trial defendant read his affidavit, in which was set out a copy of a letter written to him by the plaintiff which reads as follows:

"At Home, Oct. 2d, '93.

"Dear Husband: Henry handed me your note this morning; on opening it I discovered a check for \$5 as a present for my birthday. Please accept thanks for same, also for your kind wishes. Please accept my best wishes for your future as well.

"With love I am yours,

"MOLLIE."

It is contended that this letter proves that the husband's acts of cruelty were condoned, and that a new trial should have been granted because of this newly discovered evidence.

The affidavit is "that before and at the trial of the action he searched for and endeavored to find the letters and correspondence between plaintiff and defendant, for the purpose of using them at said trial as evidence therein; that since the said trial I have unexpectedly found a letter," etc., setting out the above quoted letter.

Upon cross-examination, plaintiff testified that she kept copies of all the letters she wrote to the defendant, and had them then.

If the defendant had been unable to find letters he desired to use in evidence, upon being informed that plaintiff had copies of them he should have requested the production of this letter, and if it was not produced he could properly apply to the court for a postponement of the trial for a reasonable time to enable

him to find it. But if it had been produced it was insufficient to prove condonation, since it does not show "an express agreement to condone," as required by section 118 of the Civil Code. At most it was only evidence of "conjugal kindness."

The judgment and order appealed from should be affirmed.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[L. A. No. 170. In Bank.—December 7, 1897.]

EMIL LEHNHARDT, Respondent, v. FRANK S. JENNINGS
et al., Appellants.

FEES OF SHERIFF—LEVY UNDER EXECUTION—JUDGMENT LIEN—ATTACHMENT—NOTICE OF SALE—ILLEGAL EXACTION OF FEES—RECOVERY BACK.—A sheriff can exact legal fees only for such acts as are necessary to a full performance of his duty, so as to protect him against any charge of dereliction, and for none others; and where the judgment under which real property is sold under execution is a lien upon the land sold, it is a sufficient seizure and levy under the execution, to give the statutory notice of sale of the land under the execution, and the sheriff cannot legally exact fees for levying the execution upon the land in such cases in the manner in which a writ of attachment is levied, and fees illegally exacted for such levy may be recovered back from the sheriff by the judgment debtor or his assignee.

ID.—LANDS OF RECORD IN NAMES OF THIRD PARTIES—MODE OF LEVY OF EXECUTION—INTEREST OF DEFENDANT.—The fact that some of the land upon which the sheriff levied stood on the records of the county in the name of persons not parties to the writ does not require that the levy of the execution should be different in case of such land, nor that there should be any notice other than that given to the general public by the ordinary posting and advertisement of sale; and, in such case, the judgment lien, levy, and sale can only operate on such interest in the land as may be in fact owned by the defendant.

JURISDICTION—AMOUNT IN CONTROVERSY—PRAYER.—The prayer of a complaint is not conclusive of the jurisdiction of the superior court if the record shows on its face that the dispute concerning an amount within the competence of that court to consider is feigned and not real.

APPEAL from a judgment of the Superior Court of San Diego County. W. L. Pierce, Judge.

The facts are stated in the opinions rendered in Department One and in Bank.

A. H. Sweet, for Appellants.

Trippett & Neale, for Respondent.

Haines & Ward as *Amici Curiae*, also for Respondent.

BRITT, C.—A decision was rendered in Department directing the reversal of the judgment obtained by plaintiff in this cause, on the ground that the case was not cognizable in the superior court, the amount in controversy appearing on the record as presented to be less than three hundred dollars. Subsequently, on the petition of respondent, accompanied by a suggestion of diminution of the record and a certified copy of matter said to have been omitted therefrom, a hearing in Bank was ordered by the court; not, as we understand, because the conclusion of the Department was considered to be erroneous on the record as filed, but because this, when supplemented by said omitted matter, was deemed to show a case of which the court below had jurisdiction.

The more material facts are stated in the former opinion; it may be added that some part of the lands levied upon stood on the records of the county in the names of persons not parties to the execution. The county was joined as a defendant for the reason, apparently, that its treasury, and not the sheriff personally, is the ultimate beneficiary of the fees collected by him. We are to inquire what things were necessary to be done by the sheriff in order to make a proper levy of an execution, on lands already subject to the lien of the judgment on which the writ was issued; not merely the procedure which would make a subsequent sale of the land good in favor of a purchaser and against the defendant in the execution (which was the question decided in *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441), but what acts were necessary to a full performance of the officer's duty so as to protect him against any charge of dereliction; for such acts he might claim legal fees, but for none others. The substance of those provisions of the Code of Civil Procedure which most nearly touch the subject is as follows: Section 542 relates to the method of exe-

cuting a writ of attachment; real property standing upon the records of the county in the name of the defendant must be attached by filing with the recorder of the county a copy of the writ, a description of the property attached, and a notice that it is attached, and by leaving like papers with an occupant, if any; and if no occupant, then by posting the same on the property. If real property of the defendant is held in the name of some other person the mode of attachment prescribed is varied to meet the exigency of such a case, notice to such other person being provided for. Section 671 makes a docketed judgment a lien upon all unexempt real property of the defendant in the county. Section 682 relates to the form of the writ of execution; when the judgment is a lien on real property, and sufficient personalty is not found, the sheriff is required to satisfy the judgment out of the real property belonging to defendant on the day when the judgment was docketed, etc. Section 688 provides that all property (not exempt by law) seized and held under attachment in the action is liable to execution. "And all other property, both real and personal, or any interest in either real or personal property . . . may be attached on execution in like manner as upon writs of attachment. . . . Until a levy, property is not affected by the execution." Section 691: "The sheriff must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property, if there be sufficient; collecting or selling the things in action, and selling the other property," etc. Section 692 provides that before the sale of real property on execution notice thereof must be given for twenty days by posting notices in the township or city where the property is situated and by publication in a newspaper of the county.

It is seen that section 691 makes the levying of the writ a part of the process of executing it. The term "levy," when employed to connote the acts by which an officer manifests the intent to appropriate land to the satisfaction of an execution, and when not defined by statute, has considerable elasticity of meaning; so probably for the reason that as the common law permitted no levy of the writ on lands, it devised no procedure for that purpose. In one state, a statute provided that a "levy" should be understood to be the actual seizure of property by the officer

executing the writ; it was held that this applied only to property capable of being seized; that it was not necessary to enter on land to make a levy; and that the law was silent as to what should be the evidence of a levy on this species of property. (*Duncan v. Matney*, 29 Mo. 368; 77 Am. Dec. 575.) In Louisiana only, it appears, is the levy on land assimilated to that of goods, and the officer is required to take and hold actual possession (*Pipkin v. Sheriff*, 36 La. Ann. 781); quite in contrast with which practice is the doctrine in North Carolina that the levy "may be made in the office, although it [the land] may be ten miles distant and the officer has never seen it." (*Bland v. Whitfield*, 1 Jones, 125. See, also, 2 Freeman on Executions, sec. 280 a; 8 Ency. of Pl. & Pr., 511, et seq.)

In *Wood v. Colvin*, 5 Hill, 228, it was held that when the judgment on which execution has issued is a lien upon land it is unnecessary to make a formal levy of the writ before proceeding to sell; and this has been said here to be the correct rule. (*Bagley v. Ward*, 37 Cal. 132; 99 Am. Dec. 256.) But the statute (Code Civ. Proc., sec. 691) evidently contemplates that levying is something different from selling, and it is urged in support of the appeal that the levy thus required must be made in the manner described in section 688, viz., "in like manner as upon writs of attachment," by filing a copy of the writ in the office of the recorder, etc. Upon careful consideration, our conclusion is different; the purpose of the provisional remedy of attachment is to obtain security for the satisfaction of any judgment that may be recovered in the action (Code Civ. Proc., sec. 537); so the purpose of attaching under the writ of execution, as permitted by section 688, is to obtain security for the satisfaction of a judgment previously recovered; but, when such judgment is already a lien, the main object of an attachment has been accomplished. Again, if to levy an execution on lands in obedience to said section 691 necessarily means attaching them in like manner as upon writs of attachment, then although there may have been first a regular statutory levy of a writ of attachment in the action, the lien of which was preserved by the judgment (*Porter v. Pico*, 55 Cal. 174), it would still be indispensable, when the execution issues, to repeat with the latter writ the proceedings taken under

the former, which would seem to be mere futility. (*Beaton v. Reid*, 111 Cal. 484.)

In *Bagley v. Ward*, *supra*, the court seems to have been disposed to concede that by the provision that "property may be attached on execution in like manner as upon writs of attachment," then contained in section 217 of the practice act, the legislature intended to require, in all cases, for the levy of an execution, the filing in the recorder's office of a copy of the writ with a description of the property levied upon, as in the case of an attachment; "but," said the court, "however this may have been, it is now too late to insist on that construction. The practice has been almost uniform since the adoption of that provision in 1851, to omit the filing of a copy of the execution in the recorder's office." *Bagley v. Ward* illustrates the practice then understood to be prevalent; there has been no change in the statutes material to the question since that time; and, of course, if filing a copy of the writ in the recorder's office might be omitted, so might the other steps necessary to the levy of a writ of attachment. The clause of section 688 that, "until a levy, property is not affected by the execution," has no bearing in the present controversy. (*Blood v. Light*, *supra*.)

It was remarked in *Southern Cal. etc. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 223, 28 Am. St. Rep. 115, that the act of the officer by which he indicates the particular property which he intends to sell under the execution is called a levy. The conclusion stated more at large by Shaw, C. J., in *Hall v. Crocker*, 3 Met. 245, is similar: "The statute having fixed upon no specific act which will constitute the seizure of land on execution, the court are of the opinion that when an execution has been delivered to an officer, with directions to levy the same on the real estate of the debtor, and the officer accepts the execution with such directions, and consents and undertakes to execute it, any act done by him in pursuance of that purpose is a beginning to execute it, and constitutes a seizure; and the making of a memorandum which enables him to fix the date of such act, and make his return, is sufficient for this purpose." With us, the officer is required to give notice of the sale of real property under execution by posting notices thereof in the township or city where the property

is situated, and by publication in a newspaper. (Code Civ. Proc., sec. 692.) Notice thus given is certainly an unequivocal act manifesting the intent of the officer to appropriate the described property to sale for the satisfaction of the writ, and, in our opinion, is a sufficient levy in any case where the judgment is a lien on the property to be sold. In a case in the New York court of appeals a question arose upon the effect of a statute relating to the execution of process "by seizure of or levy on money or other property in pursuance thereof;" a sheriff holding such process advertised for sale certain real property thereunder, and this was held to constitute a sufficient "seizure" within the meaning of the statute. (*Union etc. Inst. v. Anderson*, 83 N. Y. 174.) We are safe in saying that if it was a sufficient seizure it was also a sufficient levy.

It is not perceived that the case is affected by the circumstance that some of the land on which the sheriff levied stands on the records of the county in the names of persons not parties to the writ. The judgment lien or the levy or the subsequent sale could in no event operate on any interest in the land not in fact owned by the defendant. While it may, possibly, be desirable that third persons thus situated should be apprised specially of the proceeding, yet the law has not so provided. Their position is no worse than that of persons who claim land by title paramount to that of a mortgagor or other defendant in a suit where sale of the property is specifically decreed; the process issued to enforce such a judgment (Code Civ. Proc., sec. 684) is always executed without notice other than that given to the general public by the ordinary posting and advertisement. The judgment appealed from should be affirmed.

Chipman, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Temple, J., Henshaw, J., McFarland, J.,
Harrison, J., Garoutte J.

The following is the decision rendered in Department One, March 10, 1897, referred to in the foregoing opinion:

BRITT, C.—Plaintiff sues, as the assignee of one Hinton, to recover from defendant Jennings (who is sheriff of the defendant county) money paid by Hinton to Jennings, as fees demanded by the latter for official services in the levy of a writ of execution. Allegations appear in the complaint showing with considerable detail that the question arose between Hinton and the sheriff whether, in levying an execution issued on an ordinary money judgment, which judgment has become a lien on real property of the debtor, lands subject to the lien must be attached in the manner in which a writ of attachment is levied, under section 542 of the Code of Civil Procedure, the sheriff claiming that course to be proper. It is averred that the sheriff demanded “the fees hereinafter specified, which fees were paid the said Jennings under protest.” The fees so specified were for proceedings taken by the officer in accordance with said section 542, and amounted to one hundred and seventeen dollars and forty cents. Then occur the following allegations: “That said defendant demanded of said Hinton the sum of two hundred dollars, in addition to said sums heretofore stated, all of which sums the said Jennings agreed to return to said Hinton if said demand was not legal. . . . And plaintiff alleges that all of said charges and sums paid as aforesaid are illegal,” etc. The prayer is for judgment in the sum of three hundred and seventeen dollars and forty cents. The complaint was not verified, and the answer was a general denial. The court made findings containing a recital that the parties agreed upon the same as true. These show that the sheriff, in executing the writ, attached numerous parcels of land in the manner alleged by plaintiff, and charged and was paid therefor the sum of one hundred and seventeen dollars and sixty-five cents; and for this amount the court rendered judgment in favor of plaintiff. No reference is made in the findings to a demand by the sheriff, or payment to him, of anything beyond said sum of one hundred and seventeen dollars and sixty-five cents.

In our opinion, the record discloses no cause of action of which the superior court has original jurisdiction. In order that jurisdiction may be exercised by that court in an action at law for the recovery of money only, the constitution requires that the demand in suit shall amount to three hundred dollars. (Const., art. 6, sec. 5.) It is well settled that in such actions the amount

sued for determines the jurisdiction of the court. But in the cases pertaining to the subject an actual dispute concerning an amount within the jurisdiction of the court to consider appeared *prima facie* from the record (*Dashiell v. Slingerland*, 60 Cal. 653; *Bailey v. Sloan*, 65 Cal. 387; *Lord v. Goldberg*, 81 Cal. 596; 15 Am. St. Rep. 82, and others); and it has never been held that the prayer of the complaint should conclude the question of jurisdiction, regardless of the allegations on which it is founded. (See *Jackson v. Whartenby*, 5 Cal. 94.) In this case, there is no semblance of real controversy over any sum greater than that for which the court gave judgment. It is alleged in the complaint that the sheriff demanded two hundred dollars in addition to the specified fees for attaching the land; but it is not stated upon what pretext he made such additional demand, nor wherein its illegality consisted, if it was illegal, nor that it was paid. Both the contents and the omissions of the findings tend to confirm the inference that the only substantial purpose of the statement relating to an additional demand of two hundred dollars by the sheriff is to give color to the prayer for a sum sufficient to authorize the court to take cognizance of the action. If it was deemed desirable to have an authoritative decision of the question of the sheriff's duty under the writ, the law has provided methods competent for that purpose, and not obnoxious to any provision of the constitution. We recommend that the judgment be reversed, and the cause remanded, with directions to the court below to dismiss the action.

Haynes, C., and Searls, C., concurred.

[S. F. No. 973. Department Two.—December 8, 1897.]

W. B. HELLINGS et al., Appellants, v. HENRIETTA DUVAL
et al., Respondents.

APPEAL—INFORMAL CERTIFICATE TO TRANSCRIPT—MOTION TO DISMISS—
LEAVE TO ADD CERTIFICATE.—An appeal will not be dismissed on account of an informal certificate to the transcript, where the appellant produces a proper certificate, and he will be allowed to add such certificate to the record.

ID.—OMISSION OF PARTS OF JUDGMENT ROLL—DISMISSAL—EXCEPTIONS TO TRANSCRIPT.—The objection that some portions of the judgment-roll have been omitted from the transcript is not ground for the dismissal of an appeal, in the first instance; but the remedy of the respondent is to notify appellant of his exceptions to the transcript, at least five days before the hearing of the appeal, under rule XV of this court. The appellant will then have an opportunity to supply the papers, and, failing to do so, must take the risk of having his appeal dismissed.

MOTION to dismiss an appeal from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

T. M. Osmont, and Charles H. Hubbs, for Appellants.

Henry S. Foote, and Sidney M. Van Wyck, Jr., for Respondents.

TEMPLE, J.—This is a motion to dismiss the appeal from the judgment, on the ground that the time for filing the transcript on appeal has expired and no transcript has been filed, and because the pretended record which was filed contains no copy of the judgment-roll.

The first ground is based upon the informal certificate to the transcript. The appellant has produced a proper certificate, which we think he should be allowed to add to his record. This disposes of the first point.

The objection that some portions of the judgment-roll have been omitted is not a ground for the dismissal of an appeal. The remedy of the respondent in such case is to notify the appellant of his exceptions, at least five days before the hearing of the appeal, under rule XV of this court. The appellant will then have an opportunity to supply the papers, and, failing to do so, must take the risk of having his appeal dismissed.

Appellant is allowed to amend the certificate to the transcript, and thereupon the motion to dismiss is denied.

McFarland, J., and Beatty, C. J., concurred.

[Crim. Nos. 308 and 358. In Bank.—December 8, 1897.]

THE PEOPLE, Respondent, v. WILLIAM HENRY THEODORE DURRANT, Appellant.

CRIMINAL LAW—APPEAL—CONFESSION OF ERRORS—IMMEDIATE DECISION

—CALENDAR AND ARGUMENT UNNECESSARY.—A criminal cause in which the attorney general has confessed error, so as necessarily to involve the granting to the defendant appealing of all the relief which he seeks by his appeal, will be decided immediately, and it is unnecessary that the cause should be placed upon the calendar, after the regular time for filing briefs has elapsed, and be orally argued before the court prior to the decision thereof.

ID.—OBJECT OF RULES OF COURT—EXPEDITION OF CAUSES—REQUEST FOR DELAY.—The rules of this court for the making up of the calendar,

and the filing of briefs, are designed to expedite and not to delay the decision of causes, and have been framed with a view of giving all parties ample opportunity to be heard before their causes are decided against them; and where error is confessed, and it is legally impossible that the defendant can have any other or greater relief than the reversal of the order appealed from, a request that the cause be put upon the calendar and argued prior to decision is manifestly intended only for delay, and will not be granted

ID.—HOMICIDE—SENTENCE OF DEATH—AFFIRMANCE OF JUDGMENT—FIXING OF SUBSEQUENT DATE FOR EXECUTION—CONTINUANCE—ABSENCE OF COUNSEL.—When the sentence of death of a defendant convicted of murder has failed of execution as the result of an appeal, and the judgment of conviction has been affirmed upon appeal, the validity of the judgment is past question in the superior court, and it is not error to refuse a continuance of a hearing appointed for the fixing of a subsequent date for the execution of the sentence, merely because of the absence of a leading counsel in the cause, and it is sufficient to prevent the granting of a continuance that the defendant was represented by other competent counsel.

ID.—INQUIRY INTO FACTS—LEGAL REASONS AGAINST EXECUTION—EXISTENCE AND EFFECT OF JUDGMENT—JUDICIAL NOTICE—CONSTRUCTION OF CODE.—Section 1227 of the Penal Code, as amended in 1881, requiring the court to inquire into the facts, upon a defendant being brought before it, for the fixing of a date of execution of a sentence of death which for any reason has not been executed, relates exclusively to an inquiry into facts bearing upon the question whether there are any legal reasons against the execution of the judgment, such as a pardon or commutation of sentence, etc., and does not necessitate an inquiry by testimony or other evidence as to the existence of the judgment and its legal effect, of which the court takes judicial notice.

ID.—BURDEN UPON DEFENDANT.—The burden is upon the defendant to show, if he can, that any legal cause exists against execution of the judgment.

1D.—JUDGMENT ORDERING CONFINEMENT OF PRISONER IN STATE'S PRISON—RES ADJUDICATA.—The legal effect of an explicit direction in the judgment that the defendant should be kept in close confinement at San Quentin by the warden of that prison from the time of his delivery thereat until his execution, is a question involved upon an appeal from the judgment, and, so far as the judgment is concerned, is thereby concluded.

1D.—SUPERFLUOUS DIRECTION—DUTY OF WARDEN OF STATE'S PRISON.—It may be true that a direction to keep the defendant in close confinement has no proper place in the judgment, but, if so, it is superfluous and harmless, it being, in the absence of such a direction, the duty of the warden under the statute to keep the prisoner closely confined in the designated prison.

1D.—IMPRISONMENT PART OF PUNISHMENT FOR MURDER—JUDGMENT NOT VOID.—Imprisonment in the penitentiary pending execution is part of the punishment for murder provided by law; and a judgment directing such imprisonment is not void on the ground that it imposes a double punishment.

1D.—REFUSAL OF CERTIFICATE OF PROBABLE CAUSE—APPEAL—RENEWAL OF APPLICATION.—The remedy for the refusal of a certificate of probable cause for an appeal in a criminal case is not by appeal from the order of refusal, but by renewing the application before a justice or justices of this court.

1D.—ORDER FIXING DATE OF EXECUTION APPEALABLE—STAY OF EXECUTION—CERTIFICATE OF PROBABLE CAUSE—TIME MUST BE ALLOWED FOR BILL OF EXCEPTIONS.—An order fixing the date of execution of a sentence of death, after the original time fixed by the sentence has elapsed, is appealable as being an order made after final judgment affecting the substantial rights of the defendant; but the execution of the sentence will not be stayed unless there is a certificate of probable cause, and in order to allow the justices of this court an opportunity properly to determine whether there is probable cause for the appeal, the time fixed by the order must be sufficient to allow the settlement of a bill of exceptions; and where such order fixes so short a time as to deprive the defendant of any opportunity of getting a bill of exceptions or any authenticated record before this court, it is erroneous upon its face, and a certificate of probable cause will be granted for an appeal therefrom, and it will be reversed upon such appeal.

APPEALS from orders of the Superior Court of the City and County of San Francisco fixing the time for the execution of a previous sentence of death. George H. Bahrs, Judge.

The facts are stated in the opinion of the court.

John H. Dickinson, Eugene N. Deuprey, and Louis P. Boardman, for Appellant.

William F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

BEATTY, C. J.—Two appeals entitled and numbered as above are pending in this court. Each is from an order of the superior court fixing a day for carrying into execution a sentence of death. The case is this: The defendant was convicted of murder in the first degree by a verdict involving the extreme penalty. He appealed from the judgment and from an order denying his motion for a new trial, but the judgment and that order were affirmed. (*People v. Durrant*, 116 Cal. 179.) Upon the going down of the *remittitur*, an order was made by the superior court requiring the sheriff of the county to produce the body of the defendant in that court on the tenth day of April, 1897. On that day, the defendant and his counsel being present in court, he was informed by the court of the previous proceedings in the cause, and asked to state any legal reason he might have why the court should not make an order fixing a time for carrying into execution the judgment theretofore pronounced against him. His objections having been heard and overruled, an order was made directing his delivery within ten days to the warden of the state prison at San Quentin; that said warden keep him in close confinement in said prison until Friday, the eleventh day of June, on which day between sunrise and noon, the warden was commanded to execute him by hanging. From this order the defendant immediately took the appeal first above entitled. The transcript of the record was filed in this court on May 8th, but that was too late to admit of a submission and decision of the cause under the rules of the court before the day appointed for the execution. Neither the people nor the defendant asked for an order to expediate the hearing, but the defendant applied to the justices for a certificate of probable cause for his appeal, which, if granted, would have had the effect of staying the execution. No justice of the court was, however, willing to certify that there was any probable cause for the appeal, and the execution would have taken place except for a *habeas corpus* proceeding instituted in the circuit court of the United States in behalf of the defendant. His petition for a writ of *habeas corpus* was denied by the circuit court, but his appeal to the supreme court

of the United States was allowed, the effect of which was to stay all proceedings under the judgment and order of the state court. Pending the proceedings in the federal courts, by consent of all parties the hearing of this appeal was continued from term to term until it was finally submitted at Sacramento in November. Matters being in this position, and the announcement having been made by telegraph that the supreme court of the United States had dismissed the defendant's appeal in the *habeas corpus* proceeding, the superior court, on the ninth day of November, made an order requiring the sheriff to produce the body of the defendant in court on the following day, to enable the court to inquire into the facts and to determine whether any legal reasons existed why the judgment of death should not be executed. In obedience to this order the defendant was brought into court on the tenth day of November, and in the presence of his counsel again informed of the previous proceedings in the cause, and required to state any legal reason he might have why a date should not be fixed for his execution.

In response to this demand the defendant offered in evidence certified copies of the proceedings in the circuit court upon his application for a writ of *habeas corpus*, from which it clearly appeared that his appeal to the supreme court had been regularly allowed and perfected, and that no *remittitur*, mandate, or order had been received from the supreme court showing any disposition of that appeal.

To this showing by the defendant no counter-showing whatever was made on the part of the people. The defendant, by his counsel, thereupon objected to any further action by the court for want of jurisdiction: 1. By reason of the pendency of the appeal in the *habeas corpus* proceeding in the supreme court of the United States; and 2. By reason of the appeal pending in this court from the order of April 10, 1897. The defendant also made other objections which need not be stated here. All these objections were overruled, and the court, on the tenth day of November, made an order directing the execution of the defendant on the 12th of November, between sunrise and noon.

From this order the defendant immediately appealed, but his bill of exceptions was not settled before the 18th, perhaps not before the 22d of November, *i. e.*, from six to ten days after the

time when the order commanded his execution. In the meantime, however, the supreme court being in session at Sacramento, counsel for defendant proceeded to that place, and on the afternoon of the eleventh day of November laid before the justices a copy of the order of November 10th, and of some of the proceedings in the superior court, certified by the county clerk, upon which he petitioned for a certificate of probable cause for his appeal, which was immediately granted by the concurrence of six out of the seven justices, and certified to the warden of San Quentin in time to prevent the execution. A transcript of the record on this appeal—which is the second above entitled—was filed in this court on December 2d.

On December 6th the attorney general, upon notice to counsel for defendant, moved to dismiss both appeals upon the ground that the days respectively fixed by the orders appealed from for carrying the sentence of death into execution having passed, the orders were no longer of any force and the questions involved were mere moot questions not calling for further consideration by the court.

But the court being of the opinion that the appeals ought not to be dismissed (*People v. McNulty*, 95 Cal. 594), and that there were some important points of practice involved which ought to be settled by a speedy decision, intimated that opinion from the bench, whereupon the attorney general offered to submit the second appeal (the first, as stated above, was submitted in November), upon a confession of error in the order appealed from, and asked an early decision in both cases.

Counsel for appellant, notwithstanding the confession of error which necessarily involved the granting of all the relief which they seek by their appeal, viz., the reversal of the order appealed from, objected to the submission of the second appeal, contending that under the rules of the court the case must go upon the calendar after the regular time for filing briefs, and be orally argued before the court prior to any decision.

This objection is without merit. The rules for making up the calendar and filing briefs are designed to expedite, not to delay the decision of causes, and are framed with a view of giving all parties ample opportunity to be heard before their causes are decided against them. If there were any substantive right of ap-

pellant to be prejudiced by an immediate submission of his appeal his objection would not be unreasonable, but since the attorney general has confessed error and conceded that the order appealed from must be reversed, and since it is legally impossible that the appellant can ever have any other or greater relief than a reversal of the order, it is manifest that his objection is interposed only for the purpose of delay. We shall, therefore, consider and decide both appeals together.

It is not necessary to discuss the objections raised upon the first appeal at any length, but they will be briefly noticed.

1. From the beginning of the proceedings in the superior court the defendant had the assistance of two members of the bar as counsel—E. N. Deuprey and J. H. Dickinson. During a portion of the trial Mr. Deuprey was absent on account of sickness. On the tenth day of April, when the defendant was required to show cause why a day for his execution should not be fixed, Mr. Dickinson was absent, and Mr. Deuprey moved for a continuance upon that ground. It was shown that Mr. Dickinson had received due notice of the time and place fixed for the hearing of the motion of the people to fix the date of execution. His absence, under the circumstances, would not have made the granting of a continuance compulsory, even if his presence could have been of any advantage to the defendant. But it could not, for the defendant was represented by his other counsel, Mr. Deuprey, who was entirely competent, notwithstanding his absence during a portion of the trial, to represent the defendant on this motion. His plea for delay was based upon the suggestion that General Dickinson, from his greater familiarity with the proceedings, was better able than himself to present some matters connected with the trial and affecting the validity of the judgment. But since the judgment and order denying a new trial had just been affirmed in this court, and a rehearing denied, it is clear that the validity of the judgment was past question in the superior court. The court did not err in refusing a continuance.

2. It is next contended that the court "erred in refusing to inquire into the facts of the record, and in refusing to have proof made of the condition of the record, and the fact upon which the court might act in the premises, as provided by law."

I state this objection in the language of counsel. The point of

it, as I gather from the briefs, is that the court erred in not calling the clerk of the court, and taking his testimony under oath as to the existence and identity of the record of the judgment in the case of *People v. Durrant*, then remaining in that court and just before finally affirmed in this court.

It is contended that the failure to do this was a violation of the provisions of section 1227 of the Penal Code as amended in 1891. That section reads as follows: "If, for any reason, a judgment of death has not been executed, and it remains in force, the court in which the conviction is had, on the application of the district attorney of the county in which the conviction is had, must order the defendant to be brought before it, or, if he is at large, a warrant for apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and, if no legal reasons exist against the execution of the judgment, must make an order that the warden of the state prison to whom the sheriff is directed to deliver the defendant shall execute the judgment at a specified time. The warden must execute the judgment accordingly.

The facts which this section requires the court to inquire into relate exclusively to the question whether there are any legal reasons against the execution of the judgment, as for instance, a pardon or commutation of sentence by the executive.

Of the existence of the judgment and its legal effect the court takes judicial notice. The identity of the defendant with the prisoner before the court might, under conceivable circumstances, become a question of fact, but no such question arose in this case, nor any other as to which the court was bound to take testimony. The judgment was within the judicial knowledge of the court and the prisoner was before the court, and the burden was on him to show, if he could, that any legal cause existed against executing the judgment. The court did not err in this matter.

3. It is contended that not only the order of April 10, 1897, but the original judgment also, are void, because each contained an explicit direction that the defendant should be kept in close confinement at San Quentin by the warden of that prison from the time of his delivery thereat until his execution. This was a question involved in the original appeal, and so far as the judg-

ment is concerned was thereby concluded. However, if the objection possessed any merit it might be pressed—as it is—against the order of April 10th. But it has no merit. It may be true that a direction to keep the defendant in close confinement has no proper place in the judgment, but if so it is simply superfluous and harmless. In the absence of such a direction it would be the duty of the warden under the statute to keep the prisoner closely confined in the designated prison. (Pen. Code, secs. 1217-27.) Close confinement does not mean solitary confinement in the technical sense of that expression, but only secure confinement within the prison walls.

Nor is the order or judgment void because it imposes a double punishment. It is conceded that imprisonment in the penitentiary pending execution does add something to the punishment prescribed by the law of the state for the crime of murder prior to the amendments of 1891. It was so held in both of the opinions delivered by this court sitting in Bank in the McNulty case (*People v. McNulty*, 28 Pac. Rep. 816; 93 Cal. 427), which was decided upon the controlling authority of *Ex parte Medley*, 134 U. S. 160. And for this reason only it was held in the first decision—reported in 28 Pac. Rep. 816—that the law, being made applicable by its terms to homicides committed before as well as after its passage, was *ex post facto* and void. The second opinion—reported in 93 Cal. 427—retracted nothing that was decided on this point in the first, but the law was held constitutional because after the first decision a general saving clause in the Political Code was brought to our attention which confined its application to offenses committed subsequent to its passage, leaving prior offenses to be governed by the old law.

It is therefore a point settled, so far as the deliberate opinion of this court can settle it, that imprisonment in the penitentiary pending execution is a distinct part of the punishment for murder prescribed by our law. But the law has nevertheless been held valid as to all murders committed since its enactment. The only objection ever made to it heretofore was that it was *ex post facto*. Freed of that objection by the construction it received in the McNulty case, it has been hitherto supposed to be unobjectionable, and has been enforced in numerous instances. There is no restriction upon the power of the legislature to prescribe

double, treble, or any number of punishments for an offense, except that they must not be cruel and unusual, and must not be applied *ex post facto*. There is nothing cruel or unusual in close confinement in the penitentiary, and as to this case there is no pretense that the law is *ex post facto*.

4. The court did not err in refusing a certificate of probable cause, and, if it had done so, the remedy is not by appeal but by renewing the application before a justice or justices of this court, which was the course actually taken, with the result above stated.

This disposes of all the points involved in the first appeal, and shows that the certificate of probable cause was properly denied, and that the order should stand affirmed.

In the second appeal, the confession of error renders it unnecessary to discuss the points to be ruled in defendant's favor, and improper, perhaps, to discuss any which might have been ruled against him. Our reasons for reversing the order were, we thought, sufficiently stated in the opinion filed November 11, 1897, setting forth the grounds upon which we granted the certificate of probable cause. (*People v. Durrant, ante*, p. 54.) But it seems that upon one point we failed to make ourselves entirely clear. We said that an order fixing the date of defendant's execution within the time allowed him by statute to present his bill of exceptions was a violation of his rights and a gross abuse of discretion. We did not have time in making that order to elaborate the proposition stated, and, since the point of practice is important, we take the present occasion to make it plainer, if we can.

An order fixing the date of execution is "an order made after final judgment affecting the substantial rights of the defendant," and as such is appealable. (Pen. Code, sec. 1237, subd. 3; *People v. Sprague*, 54 Cal. 92; *People v. McNulty*, 95 Cal. 594.) But the appeal does not stay the execution without a certificate of probable cause (*People v. McNulty, supra*), and, therefore, the defendant may be executed pending his appeal if he fails to secure such certificate. This being so, it is of vital importance that the defendant should not be deprived of the means provided by the statute for obtaining a stay. Among those means is an application to the justices of the supreme court in case the certificate is refused by the judge of the superior court. (Pen. Code, sec.

1243; *Matter of Adams*, 81 Cal. 165.) In order to make the application to a justice of the supreme court, it is ordinarily essential that there should be a settled bill of exceptions, for by no other means can a judge who did not conduct the proceeding eventuating in the order appealed from know whether there are grounds for the appeal or not. The defendant then being by law entitled to his appeal, and entitled to a stay of proceedings pending his appeal, if any justice of the supreme court will grant him a certificate of probable cause, and a settled bill of exceptions being in most cases an essential prerequisite to his application to the justices of the supreme court, to deprive him of any opportunity of getting a bill of exceptions before the justices of the supreme court is to deprive him of his plain legal right in a matter of the highest moment, and if that is not error it would be difficult to say what error consists in.

In this case, the defendant was not only deprived of the ten days' time which the statute gives him to present his bill of exceptions, and of the further reasonable time necessary for its settlement and presentation to the justices of the supreme court, but he was deprived absolutely of any opportunity to go before that court with any properly authenticated record of the proceedings. The justices of the supreme court being at Sacramento, if but a single day had been taken to settle the bill of exceptions and furnish a certified copy, it would have been impossible to have presented the record to the justices, obtained the order and made regular service on the warden before the hour of execution had passed. This made the order erroneous upon its face without the aid of a bill of exceptions, and justified the issuance of the certificate of probable cause, regardless of the other point discussed in our opinion which was not and could not be brought regularly before us.

It has been suggested that the action of some of the justices in refusing the petition of Ebanks for a certificate of probable cause was inconsistent with these views. It is true that Ebanks was ordered to be executed in eight days from the date of the order, which was therefore erroneous, but a bill of exceptions was promptly presented and settled and certified by the judge of the superior court on the day following the order, so that when the petition for a certificate of probable cause was presented it

was supported by a duly authenticated copy of the record which showed that the defendant had been deprived of no legal right except the full time allowed by the statute for presenting his bill of exceptions, and that error he had cured by his own act. There was therefore no prejudice in the error and no ground for a reversal.

The motions to dismiss are denied. The order in case No. 308 is affirmed; the order in case No. 358 is reversed, and the cause remanded to the superior court, with directions to proceed according to law. It is further ordered that the *remittiturs* issue forthwith.

Henshaw, J., Temple, J., McFarland, J., Harrison, J., concurred.

GAROUTTE, J.—The attorney general having confessed error in the second appeal, and there being no merit whatever in the first appeal, I concur in the judgment that the first order appealed from be affirmed, and that the second order appealed from be reversed.

DISSENTING OPINION ON MOTION TO DISMISS APPEAL.

GAROUTTE, J.—There are two appeals pending before this court from orders made by the trial judge fixing the day for the execution of Theodore Durrant. The particular day fixed for the execution in each order has long since gone by. The attorney general now moves this court to dismiss those appeals upon the ground that the orders from which they were taken have ceased to have any force and effect whatever; that the questions raised thereby are no longer living questions; and that any decision rendered upon them could not possibly affect the rights of the defendant. In other words, it is insisted that by the mere lapse of time the appeals present nothing but moot questions. This position of the attorney general is eminently sound, and the appeals should be dismissed. The decision of them upon the merits could do neither the defendant nor the people any possible good; and under such circumstances our time should be devoted to matters more substantial and material. In *People v. McNulty*, 95 Cal. 594, the court refused to dismiss an appeal from an order similar to those here involved; but there the day fixed for the

execution had not expired when the motion was made. Hence that case has no bearing here. Some question is made by appellant upon these appeals to the effect that the orders were erroneous because they provided for close confinement of the defendant by the warden until the day of execution. But this contention has no force now, for the reason that such period of close confinement ceased when the day of execution passed by. So, that portion of these orders is doing the defendant no injury, even conceding it erroneous. He has served his full time of close confinement under these orders, rightfully or wrongfully, and a decision of these appeals would in no way affect the matter. The case stands exactly as though a party should serve a sentence of one hundred days in jail, and thereafter appeal from the judgment of conviction. The court would refuse to hear such an appeal upon the ground that there was no live material issue before it.

The foregoing principles of law are fully supported by numerous decisions of this court, and I rest the matter with a single citation. In *Foster v. Smith*, 115 Cal. 611, the syllabus correctly declares the principle of the decision as follows: "Where a temporary injunction was granted to restrain a stockholder from voting at an election of the directors of a corporation, . . . and such injunction was dissolved prior to the election, an appeal taken from the order dissolving the injunction after the election had been held raises only an abstract question and will be dismissed." In the body of the opinion it is said: "It thus appears that the parties to the litigation have no rights which can be affected by a reversal of the order, and that the correctness of the order has become merely an abstract question." And again: "If the order should be reversed, the superior court would have no function to perform in consequence of such reversal." Upon sound reason, the same principle necessarily applies to this case.

I see no material and substantial purpose to be subserved by a dismissal of these appeals. As the case now stands there is no legal reason to my knowledge why the trial court should not take steps to enforce its judgment. Yet such relief is asked by the attorney general, and there is no possible objection to granting it.

I dissent from the order refusing to dismiss the appeals.

[L. A. No. 341. Department Two.—December 9, 1897.]

**VENTURA COUNTY, Appellant, v. HENRY CLAY, County
Treasurer et al., Respondents.**

ACTION UPON BOND OF COUNTY TREASURER—AUTHORITY OF DISTRICT ATTORNEY—RECOVERY OF MONEY PAID UPON ILLEGAL CLAIMS—CONSTRUCTION OF COUNTY GOVERNMENT ACT.—Section 8 of the County Government Act, authorizing the district attorney to institute a suit in the name of the county, without an order of the board of supervisors, to recover money illegally paid to any person or persons, contemplates an action brought against the recipient of funds illegally paid, and has no application to an action brought upon the bond of the county treasurer for the improper payment of illegal claims, and the district attorney has no authority to bring such an action unless ordered to do so by the board of supervisors.

ID.—DISMISSAL OF ACTION—LACK OF AUTHORITY OF DISTRICT ATTORNEY.—A motion to dismiss an action brought by the district attorney is proper procedure, when the action is brought by him without authority.

ID.—RENEWAL OF MOTION—DISCRETION.—Where the superior court is led to believe that it has fallen into error in refusing a motion to dismiss an action brought by the district attorney without authority, is is not an abuse of discretion to permit a renewal of the motion, and to decide it in accordance with views expressed by the appellate tribunal.

APPEAL from a judgment of the Superior Court of Ventura County. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

H. L. Poplin, District Attorney, for Appellant.

Blackstock & Ewing, Orestes Orr, and Barnes & Selby, for Respondents.

HENSHAW, J.—The district attorney instituted this action in the name and on behalf of the county to recover from the treasurer of the county, and from his bondsmen, moneys alleged to have been paid on illegal claims, together with a penalty of twenty per cent upon the amount so paid.

Defendants moved to dismiss the action upon the ground that it was instituted without authority, and also interposed a general demurrer to the complaint. The motion was denied, but the de-

murrer was sustained. Upon appeal to this court, it was held that the complaint stated a cause of action against the treasurer and his bondsmen; that the cause of action was not one of those contemplated by section 8 of the County Government Act, but was an ordinary action upon an official bond. The judgment was accordingly reversed, with directions to the trial court to overrule the demurrer. (*Ventura County v. Clay*, 114 Cal. 242.)

Upon the reappearance of the case in the trial court, defendants sought permission to renew their motion to dismiss upon the ground formerly urged. Permission was obtained, and the motion to dismiss was granted.

Plaintiff appeals, contending that the action is properly brought under section 8 of the County Government Act, and that authority from the supervisors is not necessary to the prosecution of such an action. Further, it is urged that the court having once denied the motion to dismiss, it was an abuse of discretion to permit its renewal upon the same ground.

* Section 8 of the County Government Act is as follows: "Hereafter, whenever the board of supervisors shall, without authority of law, order any money paid as a salary, fees, or for any other purpose, and such money shall have been actually paid, or whenever any other county officer has drawn any warrant or warrants in his own favor, or in favor of any other person, without being authorized thereto by the board of supervisors or by law, and the same shall have been paid, the district attorney of such county is hereby empowered, and it is hereby made his duty, to institute suit in the name of the county against such person or persons to recover the moneys so paid and twenty per cent damages for the use thereof, *and no order of the board of supervisors shall be necessary to maintain such suit.*"

The language italicized is significant, and when it is considered with the provisions of section 25, subdivisions 1 and 17, of the same act, the conclusion is irresistible that in all other cases saving those embraced in section 8 a district attorney can institute an action only under direction of the board of supervisors. For by subdivision 1 of section 25 it is made the duty of the supervisors "to supervise the official conduct of all county officers. . . . and to direct prosecutions for delinquencies"; while by subdivision 17 of the same section boards of supervisors are empowered

"to direct and control the prosecution and defense of all suits to which the county is a party."

By subdivision 3 of section 136 it is made the duty of the district attorney "to prosecute all actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or his county." But this gives him no right to institute proceedings at will. It merely imposes a duty upon him so to do when directed by competent authority.

Defendants' motion to dismiss, when first decided, was denied by the trial court under the conviction that the cause of action was one contemplated by section 8, and was one, therefore, which the district attorney could and should prosecute without authority from the board. In passing upon the former appeal it was said by this court: "It is enough to say that there is nothing in the body of the complaint indicating that the action is based upon section 8 of the County Government Act, nor that it is not wholly based upon the official bond set out in the complaint." (*Ventura County v. Clay, supra.*)

With this language before it, the trial court very naturally believed that it had fallen into error in its ruling denying the motion, and for this reason, and in the light of this court's utterance, it permitted a renewal of the motion, and decided it in accordance with the views expressed by the appellate tribunal. There was no abuse of discretion in this.

That a motion to dismiss was the proper procedure to take when the authority of the attorney is challenged, there can be no doubt. (*Turner v. Caruthers*, 17 Cal. 432; *Clark v. Willett*, 35 Cal. 534; *Missouri v. Luce*, 62 Fed. Rep. 419.)

In the decision upon the first appeal, as published in the official reports, the paragraph above quoted was omitted, it being considered *dictum* (See *Ventura County v. Clay, supra.*) The effect of this, however, is merely to relieve the question from the strict rule of the law of the case, and to allow its presentation for determination upon the merits.

So considering it, we think the conclusion reached by the trial court was correct. Section 8 of the County Government Act contemplates an action brought against the recipient of funds illegally paid. It is so construed in *County of Orange v. Harris*, 97 Cal. 600, where it is said: "The action is based upon the provi-

sions of section 8 of the County Government Act, which provides in substance that whenever any board of supervisors shall, without authority of law, order any money paid as salary or fees, and such money shall have been actually paid, it shall be the duty of the district attorney to commence suit in the name of the county against the person to whom the money was paid to recover the same, and twenty per cent damages for the use thereof."

This action, however, is not prosecuted against the person to whom the money was paid, but against the officer by whom it was paid, and against the sureties upon his official bond, to recover damages for the official's delinquency. This is not such an action as is contemplated by the section.

It follows that the suit was instituted by the district attorney without authority in law, and that the motion to dismiss was properly granted.

The order appealed from is, therefore, affirmed.

McFarland, J., and Temple, J., concurred.

[Crim. No. 244. In Bank.—December 11, 1897.]

THE PEOPLE, Respondent, v. JOSEPH HUBERT, Appellant.

CRIMINAL LAW—HOMICIDE—PARTIAL INSANITY—INSANE DELUSIONS—MEDICAL OPINIONS—MATTERS OF FACT—INSTRUCTIONS.—Matters of medical science and medical opinions bearing upon the question of partial insanity are to be proved as matters of fact, and are not propositions of law, though embodied in legal treatises and judicial opinions, and it is error to instruct upon them as a matter of law, or to instruct the jury that if the defendant entertained certain special beliefs which the defense claimed constituted the delusion which impelled the defendant to commit the homicide, and they were unsound, existing only in his imagination, then they were insane delusions, as matter of law.

ID.—REBUTTING EVIDENCE—GENERAL AND PARTIAL INSANITY.—Where there was evidence for the defendant tending to prove both his general and partial insanity, the prosecution may give in rebuttal as to either the testimony of acquaintances of the defendant; and in rebuttal of partial insanity the prosecution may show that the defendant was in other respects sane.

ID.—TESTIMONY OF BUSINESS ACQUAINTANCE—FOUNDATION FOR OPINION—DISCRETION.—It is largely in the discretion of the court to determine whether the business acquaintance and conversations had

by a witness with the defendant were a sufficient foundation to enable him to testify that in his opinion the defendant was sane as a business man.

ID.—EFFECT OF INSANE DELUSIONS, COMBINED WITH GENERAL SANITY—INSUFFICIENT DEFENSE—DELUSION AS TO POISON—UNJUSTIFIABLE HOMICIDE.—If the defendant had insane delusions which completely possessed him, but was sane on all other subjects, then he must be judged as though the facts with respect to which the delusions existed were real; and where these facts do not constitute a defense to the homicide, the defendant cannot be justified on account of the existence of the insane delusions; and an insane delusion of a defendant accused of the murder of his wife, that she had put poison in his food, of which he stated that he was going to procure a test, cannot if the fact existed, justify the homicide.

ID.—IMPROPER REQUEST FOR INSTRUCTIONS AS TO JUSTIFICATION OF HOMICIDE.—Instructions requested by the defendant upon the subject of justification of the homicide on the ground of insane delusions, giving him a right of self-defense, are properly refused, where there is no evidence tending to establish a delusion as to facts which, if they had been as he believed they were, would not constitute such jeopardy as would justify the homicide, and where the instructions asked are incorrect even if there had been such evidence.

ID.—MODIFICATION OF ERRONEOUS REQUEST—WEIGHT OF EVIDENCE—TEST OF RESPONSIBILITY.—An instruction requested by the defendant, which bears upon the weight of evidence and contains a test of responsibility for crime which is incorrect, should properly be refused; and the defendant cannot complain of a modification which states the correct rule of responsibility.

ID.—IMPROPER REQUEST FOR INSTRUCTION AS TO INSANITY—WEIGHT OF EVIDENCE—IRRESISTIBLE IMPULSE—CORRECT RULE.—A proposed instruction which is partly upon the weight of evidence, and which embodies the proposition that an insane irresistible impulse is a defense to a criminal charge, is properly rejected, the true rule being that notwithstanding the act was the offspring of irresistible impulse, and the impulse was irresistible because of mental disease, still the defendant must be held responsible if he at the time had the requisite knowledge as to the nature and quality of the act, and of its wrongfulness.

ID.—HARMLESS REFUSAL OF REQUEST—PRESUMPTION OF INNOCENCE OF MURDERED WIFE.—The refusal of the court to instruct the jury that it must be presumed that the wife of the defendant, who was killed by him, did not attempt to poison him, is harmless, where it is conceded that the charge was false, and where it appears that the delusion of the defendant as to such attempt did not constitute a defense under the admitted facts.

ID.—REASONABLE DOUBT—HARMLESS ATTEMPT TO EXPLAIN.—An instruction telling the jury that a reasonable doubt is a fair doubt is not properly an explanation of reasonable doubt, but the jury could not conclude that a proper instruction as to reasonable doubt is taken back by the meaningless phrase.

ID.—DECISION OF JURY ACCORDING TO CONSCIENCE.—It is not improper to instruct the jury that, after weighing the evidence, they must decide according to their consciences.

APPEAL from a judgment of the Superior Court of Calaveras County and from an order denying a new trial. R. C. Rust, Judge.

The main facts are stated in the opinion of the court. The nature of the ruling upon the evidence of the witness C. Burger is set forth in the syllabus upon the subject of the testimony of a business acquaintance, and the laying of a foundation therefor.

F. J. Solinsky, and Reddy, Campbell, & Metson, for Appellant.

W. F. Fitzgerald, Attorney General, and C. N. Post, Deputy Attorney General, for Respondent.

TEMPLE, J.—The defendant was convicted of murder in the first degree, and appeals from the judgment and from an order refusing a new trial. The defense was insanity of the defendant, caused by excessive indulgence in alcoholic drinks for a number of years, inducing chronic alcoholism, through which his brain became permanently diseased, causing delusions and rendering him incapable of knowing the wrongfulness of the act, for the commission of which he stood charged.

The evidence tended to show that he had been almost constantly drunk for some years, and during the last few months before the homicide had frequently declared that his wife was putting poison in his food, and that the poison caused sores upon his body, and he was in the habit of showing the sores in proof. He also declared that a dog had been poisoned by eating some of the food. He said his wife was a natural born criminal, and that the shape of her head indicated it. He further charged his wife and her brother with stealing eggs and other articles of personal property from his place. He had even attempted to have some food prepared by his wife analyzed, and he made complaint before a magistrate against his wife and her brother, and procured a warrant for their arrest. During all this time he was on very bad terms with his wife and treated her brutally. He wished

to obtain a divorce and tried to induce her to accept five hundred dollars for her share in the community property. He said she had been guilty of adultery with a person whom he named, and often declared his intention to take her life. On one occasion he said he would kill her if it took the shirt off his back to clear him.

It seems that he was afflicted with eczema, which caused the breaking out of sores upon his body which he attributed to poison. It was not claimed by anyone that there was any foundation for his cruel charges against his wife. On one side it was claimed that they were the offspring of malice; on the other, that they constituted an insane delusion which took firm possession of his diseased intellect, and that the homicide was entirely caused by this partial insanity; for the defense also claimed, and counsel induced the court to charge the jury that such was their defense, and counsel here contend as part of the defense, that in all other respects and upon all other subjects, except as to the subject matter of the delusion, he was perfectly sane.

The homicide was committed on the nineteenth day of April, 1895. The defendant had a wine cellar, and on that day had employed three of his neighbors to assist him in washing his casks and to rack off his wine. Whether defendant drank any liquor on that day is not shown, expressly or at all, unless from testimony showing that he was nearly always drunk, and that whenever he met acquaintances where there was liquor he insisted upon their drinking with him, we are at liberty to infer that he did not work all the morning in the wine cellar with three acquaintances without drinking. His wife prepared dinner for him and his three assistants, laying out the table in the kitchen. She placed upon the table four plates of soup, and goodnaturedly boasted to the neighbors of its quality. All sat down and commenced eating except the deceased, who continued to busy herself about the stove. The defendant tasted his soup three times deliberately, and then without a word got up and went into an adjoining room, from which he immediately returned with a pistol with which he shot his wife through the head. She became at once unconscious and died a few hours later. He said she had put poison in his soup and asked one of the company to taste it. He wanted it preserved for examination. He then or-

dered them all out of the house, and said he would go for the doctor. When one of them objected to leaving the wife there, he said: "You can't do anything for her. I have brained her." While they were getting up his horse he walked about distractedly, repeating to himself: "O Lord! What have I done," or some equivalent expression.

He then went to John K. Petty, justice of the peace, and told him he had killed his wife and expected that they would hang him for it. A few days before he had told the same judicial officer that he would have to kill her, and, when told that he would get into trouble, said didn't care a damn.

He then went to the constable and gave himself up, saying that he had shot his wife, but didn't know if she was dead. He said he took his pistol intending to make her eat some of the soup, and it went off and killed her. Soon after, however, he said he was not sorry, but was glad, and would do the same thing again.

At the trial, at the request of the defendant, the court told the jury that the defense was partial insanity, otherwise called monomania; and that defendant "was laboring under insane delusions which so permeated his reason as to incapacitate him from knowing the difference between right and wrong, as to the acts charged in the information, and his relations with the deceased, and her actions, motives, and intentions toward him, and that he acted in pursuance of such delusions."

The court also, improperly, but at the request of defendant, declared as law certain medical opinions upon the pathology of mental disease. Among them this: "The law recognizes partial as well as total insanity—that a person may be insane upon one or more subjects, and sane as to all others." And again: "A man's mental faculties may be in full vigor, but upon some one subject he seems to be deranged," etc. An instruction was also given enumerating and setting out the special beliefs which the defense claimed constituted the delusion which impelled the defendant to commit the homicide, and the jury were told that if the defendant entertained such beliefs, and they were unsound, existing only in his imagination, then they were insane delusions as matter of law. Of course, there is no such rule of law. Matters of science are always to be proven, and are treated as mat-

ters of fact, and the court should not instruct in regard to them. The fact that these matters are discussed in legal treatises or judicial opinions does not convert them into propositions of law. In some jurisdictions there is not the same objection to such instructions as here.

The reason for emphasizing the position that counsel for the defendant only claimed that the defendant was insane as to certain matters, persons, and things, and that he was sane in all other respects, seems to be to furnish a position of advantage from which to attack certain rulings admitting in rebuttal the testimony of acquaintances of the defendant as to his insanity. The objection was, that the evidence did not rebut anything because defendant did not attempt to prove general insanity, and the witnesses did not pretend to know anything of the alleged delusions. Of course, if no such partial insanity existed, intimate acquaintances could know nothing of it, and the fact that they did not was some proof that defendant had no such delusions. Besides, as a matter of fact, the defense did attempt to prove general insanity, and some of their witnesses testified as to the existence of such insanity.

And, if we admit that partial insanity was shown, this opened the door to the prosecution to show, if it could, that he was in other respects sane. If insanity were shown, the extent of it became at once material, and wherever the burden of showing its limits may have been, it was proper for the prosecution to introduce evidence upon the subject. If the defendant had certain special delusions which completely possessed him, but was perfectly sane on all other subjects, as counsel claim was their position at the trial, then he must be judged as though the facts with respect to which the delusions existed were real. (*McNaughten's case*, 10 Clark & F. 200.) I do not find in the record any offer to admit that in other respects the defendant was perfectly sane, and it is at least doubtful if the defense could make such an admission. In this case such an admission would have been fatal, for there is nothing in the alleged delusions which would constitute a defense.

I think the court ruled correctly in admitting the testimony of C. Burger, but, were it doubtful, we would not, under any or-

dinary circumstances, reverse a case upon such a point. Upon that subject a very large discretion is necessarily allowed the trial court.

The fourth and fifth instructions were properly refused. There is no evidence tending to establish a delusion as to facts which, if the facts had been as he believed they were, would constitute such jeopardy as would justify the homicide. And if there had been such evidence the instruction asked was incorrect. The fifth instruction asked contained propositions in regard to medical science which no court in this state should give.

The sixth instruction asked was properly modified. It should have been refused because an instruction as to the weight and value of evidence, but it also contained a test of responsibility for crime which was incorrect. The correct rule was stated in the modification.

Perhaps the loudest complaint is made over the refusal of the court to give instruction 8. It reads as follows: "When insanity is set up as a defense by a person accused of crime, in order that the defense may avail, the jury ought to believe from the evidence that at the time of the commission of the crime the mind of the accused was so far affected with insanity as to render him incapable of distinguishing between right and wrong in respect to the killing, or, if he was conscious of the act he was doing and knew its consequences, that he was in consequence of his insanity wrought up to a frenzy which rendered him unable to control his actions or direct his movements; but, where the insanity consists of an insane delusion, the very fact that he is possessed of such a delusion shows that he is incapable of reasoning upon that subject; otherwise it would not be an insane delusion; and if, in pursuance and as a part of said insane delusion, he should commit some overt act, or what would otherwise be a criminal act, then as a matter of law, you are instructed that he is unable to reason upon the nature or quality of the act, or to know or understand the wrongfulness of the act."

The ruling is entirely justified by the fact that the proposed instruction is partly upon the weight and value of evidence, but it contains the proposition that an insane irresistible impulse is a defense to a criminal charge. If this be not a defense then

there was no attempt to make a defense at the trial. The very statement of the defense, if it would be regarded as an admission of the facts, necessitated a conviction.

This involves also another point made, to wit, that the verdict is against the evidence, in which it is contended there is no substantial conflict.

It must be held that, conceding that the act was the offspring of an irresistible impulse, and the impulse was irresistible because of mental disease, still the defendant must be held responsible if he at the time had the requisite knowledge as to the nature and quality of the act, and of its wrongfulness. It was so held in *People v. Hoin*, 62 Cal. 120, 54 Am. Rep. 651, and in *People v. Ward*, 105 Cal. 335.

We do not know that the impulse was irresistible, but only that it was not resisted. Whether irresistible or not must depend upon the relative force of the impulse and the restraining force, and it has been well said to grant immunity from punishment to one who retains sufficient intelligence to understand the consequences to him of a violation of the law, may be to make an impulse irresistible which before was not.

It has been proposed as a rule to leave it to the jury to say whether the act was the offspring of insanity, meaning, I presume, whether the defendant would have committed the act had he not been insane.

There are many degrees in mental unsoundness. Some cases could only be detected by a very skilled expert. Some cases of mental unsoundness might be known only to very intimate acquaintances, and perhaps by them only noticeable under peculiar conditions. But, however slight the defect, only Omniscience can say whether the act would have been committed had the taint not existed. It is an impracticable rule.

It is said the impulse is irresistible, because by the impairment of the emotional part of the intellect the will power is destroyed or weakened. No one contends that the legal test is perfect, doubtless it is far from being so; but when the will power is weakened, although the mentality is not at all or only slightly impaired, the fear of punishment must be of some value as a restraint, and the class of people referred to need that restraining influence most. Lord Bromwell, in a discussion of this subject,

related the case in which a witness, to prove that a prisoner was so afflicted, related that he had once become violent and killed a cat, and said he believed the impulse could not be resisted by the defendant. His lordship asked if he thought he would have killed the cat if a policeman had been present. The witness answered no. His lordship then said he supposed the impulse was irresistible only in the absence of a policeman.

There are doubtless some cases, like that of *Hadfield's case*, 27 How. St. Tr. 1281, in which the fear of punishment does not restrain, but where the rule works manifest injustice the unfortunate defendant is in some way saved from punishment.

In *United States v. Guiteau*, 1 Mackey, 498, to show whether the act charged was the offspring of mental disease or of natural passion, the prosecution was allowed to show that the accused had always been malicious and brutal. In other words, to show any other delinquency of which he had been guilty which would tend to show that he was bad enough to commit an act so atrocious from natural passion. I think our rule more humane, more worthy of a civilized people.

The refusal of the court to instruct the jury that it must be presumed in favor of innocence that Mrs. Hubert did not attempt to poison defendant could have done no harm. It was evidently—as already said—taken for granted by everyone that the charge was false, and besides the delusion, if it existed, did not constitute a defense under the admitted facts of this case.

To tell the jury that a reasonable doubt is a fair doubt is to give an explanation that does not explain. It seems to me the first phrase is the one most easily comprehended, but the jury could not conclude that it was taken back by the meaningless phrase. The criticism upon the use of the word testimony is answered by *Mann v. Higgins*, 83 Cal. 69.

There was nothing wrong in telling the jury that after weighing the evidence they must decide according to their consciences. Of course, they must consider the evidence by the use of their reasons, and if we consider the conscience a distinct faculty they could not weigh the evidence in their consciences, but they could weigh the evidence and decide conscientiously, and that is what they were told to do.

Several other points are made which I do not think it worth

while to discuss. They have been carefully considered, and I do not think they call for a reversal.

In view of what has been said, it is unnecessary to consider further the point that the verdict is against the evidence. In addition to what has been suggested, there was evidence which would have justified the jury in concluding that the defendant was not at all insane, and, even if he were partially insane, yet the criminal act was not the offspring of such insanity, but of the natural passions of the defendant.

The judgment and order are affirmed.

Henshaw, J., McFarland, J., Harrison, J., Garoutte, J., Van Fleet, J., and Beatty, C. J., concurred.

Rehearing denied.

[Sac. No. 232. In Bank.—December 11, 1897.]

W. W. MONTAGUE & CO., Appellant, v. JOSEPH R. ENGLISH, Treasurer of City of Vallejo.

MUNICIPAL CORPORATIONS—LIABILITY LIMITED TO REVENUE OF YEAR'S INDEBTEDNESS—CONSTITUTIONAL LAW.—Under section 18 of article XI of the constitution, each year's income and revenue of a municipal corporation must pay each year's indebtedness and liability, and no indebtedness or liability incurred in any one year can be paid out of the income or revenue of any future year.

ID.—CONTRACT FOR SALE OF WATERPIPE—DELIVERY—EXHAUSTION OF YEAR'S REVENUE—VALIDITY OF CONTRACT—REMEDY ONLY AFFECTED.—A contract for the sale of waterpipe to be imbedded in the streets of a city for its use and benefit, in connection with waterworks established under vote of its electors, which was entered into and carried out by the delivery and laying of pipe thereunder, during one fiscal year, and at a time when there was money in a water fund derived from the sale of bonds for the improvement, sufficient to meet the obligation, was valid, and its validity could not be affected by any subsequent failure of revenues from that fund, or from the general fund of that fiscal year; but the seller was bound to look only to the revenues of the city for that fiscal year for payment, and the exhaustion of such revenues affected only his remedy and left him in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim.

ID.—TITLE OF WATER PIPE—INVALID PURCHASE IN SUBSEQUENT YEAR VOID WARRANT—MANDAMUS.—The title to the waterpipe laid in the streets of the city, under such contract, during one fiscal year, vested in the city, and a subsequent attempt of the city to purchase
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a part thereof during the next fiscal year, was invalid and void, and a warrant issued under such purchase drawn upon the funds of a subsequent year was without consideration and void, and its payment could not be compelled by *mandamus* to the city treasurer.

APPEAL from a judgment of the Superior Court of Solano County. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

F. W. Hall, for Appellant.

Coghlan & Harvey, for Respondent.

GAROUTTE, J.—Montague & Co. petitioned the superior court for a writ of mandate to compel the city treasurer of the city of Vallejo to pay a certain warrant drawn for the sum of ninety dollars and eighty-five cents by the trustees of said city. A demurrer was sustained to the petition, and the soundness of that ruling of the trial court is the matter presented here for consideration.

The material facts disclosed by the petition may be thus summarized: In January, 1895, the aforesaid city, by its trustees, resolved to purchase and did purchase from Montague & Co. one hundred feet of waterpipe for the sum of ninety dollars and eighty-five cents, and the warrant of said city for that amount was issued in pursuance of such purchase, and is the warrant here under consideration. At the time this pipe was so purchased it was laid underground in one of the streets of said city, and formed a part of the system of waterworks then owned and used by said city. The history of this particular piece of pipe is a material element entering into a consideration of the question at issue, and that history is as follows: The city of Vallejo, by a vote of its electors, decided to create a permanent improvement in the form of a waterworks system for the use and benefit of the city. To this end bonds were issued and sold to the amount of two hundred and fifty thousand dollars. Montague & Co., the petitioner here, entered into a contract with the city to furnish certain waterpipe, properly embedded in the streets, at a fixed price per lineal foot, and, in accordance with the terms of such contract, said Montague & Co. did furnish such pipe to the value of thirty thousand dollars. The city paid about twenty-

four thousand dollars of this indebtedness upon the contract, at which time the two hundred and fifty thousand dollars placed in the water fund became exhausted. Neither was the general fund of the city in condition to answer any demands made upon it. This contract was made and the pipe furnished and laid during the fiscal year 1893-94. The aforementioned one hundred feet of pipe was furnished and laid under this contract, but not paid for by the city for the reasons stated.

It is attempted by this proceeding to pay for the one hundred feet of pipe out of the income of the city levied and collected in the fiscal year 1894-95. This can be done if the pipe was purchased during that fiscal year, and not otherwise. If the title to this pipe was in Montague & Co., January, 1895, when the board of trustees of the city attempted to make the purchase, then there can be but one result to this litigation. But, on the contrary, if Montague & Co. had no title at that time, there was no sale and no contract, and the treasurer was entirely justified in refusing payment of the warrant here in dispute.

Where did the original contract between Montague & Co. and the city of Vallejo leave the title to this one hundred feet of pipe? The true construction of section 18, article XI, of the constitution of this state locates that title. That section reads: "No county, city, town, township, board of education, or school district shall incur indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void." Justice Ross, in *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 642, declares the meaning of this provision of the constitution to be: "That no such indebtedness or liability should be incurred (except in the manner stated) exceeding in any year the income and revenue actually received by such county, city, town, township, board of education, or

school district. In other words, that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." This construction has been approved in terms in *Smith v. Broderick*, 107 Cal. 648. By the facts of the case at bar it appears that at the time the contract was entered into by the city with petitioner to furnish this waterpipe there was money in the water fund to meet the obligation. It further appears that at the time the pipe was delivered to the city in the manner demanded by the terms of the contract there was money in the fund to pay the indebtedness, and it further appears that these events both occurred during the fiscal year 1893-94. Under these conditions, we find nothing in the contract violative of any provision of the aforesaid section of the constitution. The contract being valid in the first instance, we are unable to see how any event happening subsequent to that time can vitiate it; and by such contract the title to the pipe vested in the city. The mere fact that the fund upon which the party has relied for payment has become exhausted after he has furnished the material demanded by his contract and before presentation of his claim in no manner bears upon the validity of the contract or the legal liability of the city. Such unfortunate conditions facing the claimant only affect his remedy. The contract exists, and the liability of the city exists, but under the construction of this provision of the constitution which declares that each year's revenue of the municipality must pay each year's indebtedness, the claimant is bound to look for the satisfaction of his claim in that year's income and only there. This principle of law under an exactly similar state of facts is declared in *Weaver v. San Francisco*, 111 Cal. 319, where it is said: "Even though at the time of making his contract there are funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract can mature into a claim against the city, and, if others whose claims have accrued subsequent to his are able to intercept these funds, he is in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim."

These views lead us to the conclusion that the contract for all the pipe furnished by petitioner to the city was a complete, perfect, and valid contract; that the title to such pipe passed to the city, and that the income of the city for the fiscal year 1893-94 may be drawn upon for its payment, if any such income there be. It follows that the city treasurer was justified in refusing to pay this warrant, upon the ground that it had been issued without consideration and was therefore void.

If the fact that an election was held authorizing this improvement to the city is material to this litigation, such fact must tend to strengthen the legality of the contract entered into between these parties, rather than weaken it.

The judgment appealed from is affirmed.

Harrison, J., McFarland, J., and Henshaw, J., concurred.

[Sac. No. 239. Department Two.—December 13, 1897.]

E. J. CROLY, Appellant, v. BOARD OF TRUSTEES OF THE CITY OF SACRAMENTO, Respondent.

MUNICIPAL CHARTER OF SACRAMENTO—POWER OF BOARD OF TRUSTEES—TRIAL OF CHARGES AGAINST SUPERINTENDENT OF STREETS—JURISDICTION—SUFFICIENCY OF CHARGES—PROHIBITION.—Under the municipal charter of the city of Sacramento, the board of trustees has jurisdiction to try the superintendent of streets upon charges of incompetency, neglect of official duty, and being interested in contracts payable from the city treasury, in violation of the charter, and to remove him from office, if found guilty thereof; and the question of the sufficiency of the charges in form must be made to the board having the authority to determine them, and cannot be considered upon application for a writ of prohibition, nor will such writ lie to prevent a trial of the charges, where none of them is based upon a violation of the general laws of the state, and the subject matter of the charges is within the class of matters that the board is authorized to try.

ID.—CONSTITUTIONAL LAW — EXERCISE OF JUDICIAL POWER—MUNICIPAL AUTHORITY.—The charter of the city of Sacramento is not unconstitutional as conferring the exercise of a judicial power upon the board of trustees to try a municipal officer thereunder; but the appointment and removal of a city superintendent of streets is a matter purely municipal, which, under the constitutional power to frame a city charter, may be conferred upon the municipal body, and is rather the exercise of a power necessary for its police and good administration than the exercise of judicial powers by a legislative body.

ID.—COMMON LAW POWER OF AMOTION OF OFFICERS.—It seems that there is a common-law power of amotion of officers as an incident to all corporations, though not conferred by statute; but the question is undecided, and is referred to as showing that a charter provision authorizing such amotion is not to be considered as unprecedented, or held unconstitutional or inoperative or unless upon clearly sufficient grounds.

ID.—DOUBLE PENALTY—REMOVAL AND DISQUALIFICATION—QUESTION UNDETERMINED.—The board of trustees of Sacramento having power and jurisdiction under its city charter to remove the superintendent of streets from office for sufficient cause shown, as provided therein, prohibition will not lie to restrain their action, regardless of the question whether the power conferred by the charter upon them to perpetually disqualify him from holding office under the municipality is or is not invalid; and such question is left undetermined until properly raised, upon the rendition of a judgment of disqualification by the board of trustees.

APPEAL from a judgment of the Superior Court of Sacramento County. A. P. Catlin, Judge.

The facts are stated in the opinion of the court.

White, Hughes & Seymour, for Appellant.

Hiram W. Johnson, for Respondent.

THE COURT.—A citizen of the city of Sacramento presented in writing to the board of trustees certain charges against appellant, as superintendent of streets; whereupon the board fixed a time for the hearing thereof, and caused a copy of the charges and a notice of the time fixed for the hearing to be served upon appellant, who thereupon petitioned the superior court for a writ prohibiting said board from proceeding to try him upon said charges. An alternative writ was granted, with an order to show cause why it should not be made absolute. The board demurred to the petition, and upon the hearing the demurrer was sustained, the alternative writ discharged, and appellant's petition dismissed; and from that judgment he appeals.

The charter of the city of Sacramento contains the following provisions:

"Section 25. The board of trustees shall have power: 1. To try, and by majority vote of all the members of the board to remove from office, appointees against whom charges have been preferred; and by not less than seven affirmative votes to remove

any appointee at any time when in the judgment of the board the public service will be improved thereby."

Section 64 of the said charter provides that the superintendent shall be a qualified elector, "and shall be appointed by the mayor by and with the consent of the board of trustees, and whose term of office shall be two years."

Section 211 provides as follows: "No member of the board of trustees and no officer or employee of the city shall be or become, directly or indirectly, interested in or with the performance of any contract, work, or business, or in the sale of any article the expense, price, or consideration of which is payable from the city treasury, or in the purchase or lease, of any real estate or property belonging to or taken by the city, or which shall be sold for taxes or assessments, or by virtue of legal process at the suit of the city. Any member of the board or any officer or employee of this city violating the provisions of this section, or who shall be, directly or indirectly, interested in any franchise, right or privilege granted by the city while he is such member, officer, or employee, unless the same shall devolve upon him by law, shall forfeit his office, and be forever disqualified from holding any position in the service of the city; and all contracts made or rights or franchises granted in violation of this section shall be absolutely void."

The charges against appellant are of incompetence, neglect of official duty, and of violations of said section 211, and contain seven or eight specifications.

Appellant's first contention is stated as follows: "Assuming that upon charges in proper form being presented the board of trustees could try the petitioner and pass judgment removing him from office, the accusation preferred is not sufficient to confer jurisdiction."

This is, in effect, a demurrer to the charges presented to the board, and assumes that the board would have lawful authority to try him and impose the prescribed penalty if the charges presented to it sufficiently stated the grounds of accusation. It is not questioned that the subject matter of the charges attempted to be stated come within the class of matters which the board is authorized to try, but the contention is that they are so defectively stated as not to give the board jurisdiction. But if the board

has jurisdiction to try appellant upon the matters alleged, if properly stated, it has power to determine, in the first instance at least, their formal sufficiency, and this objection should have been made to the board. The writ of prohibition will not lie to determine the sufficiency in form of these charges. If the charges were based upon violations of the general laws of the state, as that appellant had murdered or robbed A B, prohibition would lie; for though one guilty of such offenses is not a fit person to occupy any municipal office, he must first be convicted by a court having jurisdiction to try such offenses, and upon the record of such conviction the board might lawfully remove him under said provision of the charter. (*Rex v. Richardson*, 1 Burr, 517; 1 Dillon on Municipal Corporations, sec. 251.) It may be said, however, that such charges "must be specifically stated with substantial certainty; yet the technical nicety required in indictments is not necessary." (1 Dillon on Municipal Corporations, sec. 255.)

It is further contended by appellant that said provision of said charter is unconstitutional; that the trial of an officer or employee under said provision is an exercise of judicial power, and the board, while acting thereunder, acts as a judicial tribunal; that the charter attempts to provide a court for the trial of city officers for misdemeanors in office, notwithstanding the legislature has enacted a statute under which civil officers shall be tried for such offenses; and cites the Penal Code, sections 758 to 772, inclusive.

Section 1 of article VI of the constitution, which is supposed to be violated by said provision of the charter, is as follows: "The judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish in any incorporated city or town, or city and county."

Appellant argues that "all the judicial power which may be exercised in this state under the constitution is vested in the courts specifically named in the constitution, and in such inferior courts as the legislature may establish by virtue of the section last referred to."

The powers of the government of this state are divided into

three separate departments—the legislative, executive, and judicial. The section above quoted creates the judicial department, by providing for a system of courts, or judicial tribunals, properly so called, the jurisdiction of which is fixed by the constitution itself or by the legislature, but does not necessarily exclude the granting of judicial power by the same constitution to municipalities, or other local subdivisions of the state, in matters purely local, and in which the state at large has no direct interest. The language of the constitution in creating the judicial department is no more comprehensive than that used in creating the legislative department, which declares that: "The legislative power of this state shall be vested in a senate and assembly, which shall be designated the legislature of the state of California"; yet the same constitution provides that cities having more than three thousand five hundred inhabitants may "frame a charter for its own government" through a board of fifteen freeholders elected by the voters of the municipality, which charter, when ratified by a majority of the voters of such city, shall "be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment. Such approval may be made by concurrent resolutions, and, if approved, by a majority vote of the members elected to each house, it shall become the charter of such city, or, if such city be consolidated with a county, then of such city and county, and shall become the organic law thereof, and supersede any existing charter and all amendments thereof and all laws inconsistent with such charter." (See Const., art. XI, sec. 8, as amended in 1892.) Here it will be seen that legislative power to frame a charter is expressly given, notwithstanding the comprehensive language in which it is declared that "the legislative power of the state shall be vested in" the legislature.

The charter of the city of Sacramento, here under consideration, was framed under said provision of the constitution, and is of the class commonly known as "freeholders' charters."

It cannot be questioned that the appointment of a superintendent of streets is a matter purely municipal, and which may properly be left to the municipality to be exercised in the manner provided in its charter, and it would seem to follow as a logical sequence that the power to remove

an officer so appointed is equally a matter of purely municipal concern. It is said that: "A provision in a city charter vesting the board of aldermen with the sole power to try all impeachments of city officers, the judgment only extending to removal and disqualification to hold any corporate office under the charter, is not unconstitutional as authorizing the exercise of judicial powers by a legislative or municipal body, but is rather the exercise of a power necessary for its police and good administration." (Dillon on Municipal Corporations, sec. 244.)

In England, it is held that "the power to remove a corporate officer from his office, for reasonable and just cause, is one of the common-law incidents of all corporations." (*Rex v. Richardson*, 1 Burr. 517.) It is there denied that there can be no power of amotion unless given by charter or prescription; and the contrary doctrine is asserted—that from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental. Judge Dillon, though stating that the question has not been judicially settled, expresses the opinion that our municipal corporations, in the absence of any express or implied restriction in the charter, possess the incidental power, not only to make by-laws, but for cause to remove corporate officers, whether elected by it or by the people. (Dillon on Municipal Corporations, secs. 242, 243.)

In *Richards v. Clarksburg*, 30 W. Va. 491, 20 Am. & Eng. Corp. Cas. 111, the power of the common council to remove the mayor, as a common-law incident of all corporations, and without any express grant of the power of amotion given by the statute, was sustained.

Other cases more or less directly sustaining the proposition that the power to remove officers is a common-law incident to corporations might be cited, but that question is not here so involved as to require a decision, and is not decided. They are referred to for the purpose of showing that the provision of the charter here in question is not an innovation, nor an unprecedented provision which should be viewed with fear and distrust, or held unconstitutional or inoperative, unless upon clearly sufficient grounds.

Returning from these general considerations to the charter

provision before us, it is to be observed that it provides two separate and distinct penalties for official delinquency and misconduct: the one removal from office, the other a perpetual disqualification from holding any other position in the service of the municipality. The foregoing citations and quotations sufficiently indicate that both of these penalties are recognized as incidents to the corporate existence of municipalities. We are not, however, called upon to decide in this proceeding whether the second penalty is one which may properly be imposed under the charter, or, in other words, whether the penalty of perpetual disqualification and the consequent deprivation of an important right of citizenship can be adjudged against an individual by any other than a strictly judicial tribunal; for it is clear that the right of amotion is but the exercise of a police power necessary to the welfare of a city. So much of the charter provision, therefore, is unquestionably valid. The decision upon this point is determinative of this appeal, for the suit is in prohibition to restrain the board of trustees from acting upon the theory that the law as a whole is invalid and unconstitutional. We need not attempt to anticipate the board's decision, and it is sufficient to say that, if it should render a judgment of perpetual disqualification against plaintiff in this proceeding, it will be time enough then and thereafter to pass upon that question.

The judgment appealed from is affirmed.

[S. F. No. 813. Department Two.—December 13, 1897.]

WILLIAM H. PORTER, Respondent, v. **JOHN M. FILLEBROWN**, Executor, etc., of **ANN M. FILLEBROWN**, Deceased, Appellant.

GUARDIAN AND WARD—ACCOUNTING—EXPENSES FOR CARE OF WARD—PROVISIONS OF WILL.—In an action by a ward against the estate of his deceased guardian for an accounting of moneys belonging to him, which came into the possession of the guardian, the defendant is not entitled to credit for the expenses incurred by the guardian in maintaining the ward during his minority, if by her will the guardian directs that no charge shall be made against the ward for any moneys loaned him, or for any expense she had been to on his account during her lifetime.

ID.—FORM OF ACTION—AMENDMENT OF COMPLAINT.—Where the claim of the ward, as presented against the estate of the guardian, set

out in detail all the facts necessary to establish the liability of the guardian for an accounting, and the action thereon, as originally brought, was in form a mere action at law for the amount received by the guardian, which was less than three hundred dollars, it is not error for the court to allow the plaintiff to amend his complaint so as to make it an equitable action for an accounting of the trust arising under the guardianship, and thus within the jurisdiction of the superior court.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order refusing a new trial. W. E. Greene, Judge.

The facts are stated in the opinion of the court.

Welles Whitmore, for Appellant.

A. B. Hunt, for Respondent.

THE COURT.—Judgment was rendered for plaintiff in the sum of two hundred and ninety-two dollars and thirty-six cents, with interest compounded yearly from the eleventh day of November, 1868. Defendant appeals from the judgment and from an order denying a motion for a new trial.

The appellant certainly makes a pretty strong case, showing that the judgment in this case does an injustice to appellant and to the estate which he represents; but we think that there was evidence sufficient to support the findings of fact, and, taking those findings as true, we cannot see any clear ground for a reversal of the judgment.

The appellant is the grandson of the deceased, Ann M. Fillebrown, who died in 1894. In 1866, when plaintiff was about three years old, he was taken into the family of the deceased in the state of Wisconsin, and was raised, cared for, maintained and educated by her as one of her own children and at her own expense. He lived with her continuously until he was about fifteen years old, when he went to the state of Nebraska, and remained there two or three years. He then returned to the house of deceased, and shortly afterward came with her to California. He continued to live with the deceased here until after his majority, and about ten years elapsed after his majority before her death. He avers that he always supposed that he was an adopted child of deceased, and did not know that she had ever been his

guardian until after her death; and he avers that after her death he discovered that she had been appointed his guardian in Wisconsin in 1868, and that on the eleventh day of November, 1868, she, as his guardian, received from the executors of an uncle of plaintiff, named William H. Fillebrown, the said sum of two hundred and ninety-two dollars and thirty-six cents, money alleged to have come to plaintiff from the estate of William H., through plaintiff's mother, Mary E. Porter, who was a sister of said William H. He further avers that the deceased fraudulently concealed from him the fact of said guardianship, and the fact that any money was coming to him as aforesaid, and fraudulently mingled said money with her own, so that it cannot now be traced and identified. He presented a claim setting forth these facts to appellant, executor of the estate of Ann M., and the executor having refused to allow the claim respondent brought this suit. All the averments of the complaint were substantially found to be true by the court below.

The evidence that there ever was any money coming to the respondent from the estate of his uncle was, as appellant contends, exceedingly slight, but we think that there was sufficient proof to warrant the court in finding that the deceased, as the guardian of the respondent, received from the executors of said estate and receipted therefor the amount of money named in the complaint; and this being so, it is immaterial to inquire whether or not said money should have gone to the deceased as such guardian. And the finding of the court below, that the deceased did actually receive and retain said money as belonging to the respondent and as his guardian, is an answer to a great many of the points made by appellant as to the preliminary proof that there was such money coming to him. It is admitted and found that the expense incurred by deceased in maintaining respondent during the earlier years of his life far exceeded the amount which she is alleged to have received as his guardian. But the court below refused to allow anything for said expenses: 1. Upon the ground that they were barred by the statute of limitations (which we think is not tenable), and 2. Because the will of said deceased referring to the respondent contained this clause: "I direct, however, that no charge be made against him for any moneys that I have loaned him and for any expense that I have

been to on his account during my lifetime"; and we are disposed to think that this second ground is tenable. It is not improbable that if the deceased had been alive when this suit was commenced she could have satisfactorily explained the grave charges which the respondent made against her after her death; and, therefore, if the court had found that this action was barred by laches, such finding could not have been disturbed. But the court found the other way, and we do not feel warranted in saying that such finding has no support in the evidence.

The most serious point made by appellant is, that the court had no jurisdiction of the cause because the amount of the principal claimed was less than three hundred dollars, and that, as the original complaint was in the form of a mere action at law upon a creditor's claim, the court erred in allowing the plaintiff, when the trial had been nearly completed, to amend his complaint so as to make it an equitable action for an accounting of the trust arising under the guardianship; but as the claim as presented to the executor stated all the facts upon which the plaintiff relied, we think that the change made by the amendment to the complaint was allowable. Of course, one suing an estate must stand upon the claim which he has presented for allowance; but we think that the claim as presented in this case warranted the form given to the complaint by the amendment.

There is some evidence to support the findings of the court below that the deceased never repudiated her trust, and that respondent did not know and cannot be held to knowledge of the facts upon which the action is based until within three years of the commencement of the action; and therefore the conclusion that the action was not barred by the statute of limitations cannot be here disturbed. We do not deem it necessary to notice in detail the various exceptions by which the main questions in the case are raised.

The judgment and order appealed from are affirmed.

Hearing in Bank denied.

[L. A. No. 267. Department Two.—December 13, 1897.]

SAMUEL K. LINDLEY, Respondent, v. **ELON G. FAY et al.**,
Appellants.

REAL ESTATE BROKER—COMMISSIONS UPON SALE—REASONABLE COMPENSATION—PLEADING—GENERAL DEMURRER TO COMPLAINT—AMBIGUITY—TERMS OF EMPLOYMENT.—Where the complaint in an action by a real estate broker for the recovery of commissions upon a sale of real estate alleged employment of plaintiff by defendants, to sell certain lands, and an agreement to pay him a reasonable compensation for his services, provided he should succeed in selling the same on terms satisfactory to the defendants, and that he found a purchaser who entered into an agreement in writing with the defendants for sale of the lands, in which writing defendants also agreed to pay the plaintiff the regular commissions out of the first moneys received, the question whether the complaint is ambiguous or uncertain as to the terms of the employment is not raised upon general demurrer to the complaint.

ID.—CONSTRUCTION OF COMPLAINT—CONTRACT ALLEGED—RECITAL IN WRITTEN AGREEMENT—VARIANCE.—Only one contract is averred in such complaint, and that is to find a purchaser upon terms satisfactory to the defendants, for a reasonable compensation, and the statements as to the contents of the written agreement between the purchaser and the defendants is a mere recital, which does not help out or vary the terms of the alleged employment; and where there is no proof of the contract alleged, the contract recited in the writing is not, so far as concerns the compensation, the contract averred in the complaint.

ID.—CONTRACT TO PAY COMMISSIONS OUT OF FIRST MONEYS RECEIVED—FAILURE TO CONSUMMATE CONTRACT.—Under a written contract to pay the commissions of a broker out of the first moneys received, the broker is not entitled to compensation when he finds a purchaser ready, willing, and able to purchase on the prescribed terms; but there must be a sale and a first payment to entitle him to recover; and where the sale was not consummated, by reason of the purchaser not accepting the title, and the alleged contract was not executed so as to bind the parties, and no sale was in fact consummated, and the purchaser invested elsewhere, the broker can recover nothing.

ID.—ORDINARY CONTRACT FOR COMMISSIONS—STATUTE OF FRAUDS—MEMORANDUM.—Under an ordinary agreement that a broker is entitled to commissions when he furnishes a purchaser, able, ready, and willing to buy, a memorandum in writing, signed by the vendor and disclosing the terms of the contract, is sufficient to satisfy the statute of frauds, though the contract of purchase was not so executed as to bind the parties.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. **J. W. McKinley**, Judge.

The facts are stated in the opinion of the court.

J. S. Chapman, for Appellants.

Murphy & Gottschalk, for Respondent.

TEMPLE, J.—This action was brought to recover a broker's commission for the sale of real estate. The complaint charges that on or about April 17, 1894, defendants employed plaintiff to sell certain lands, and agreed to pay him a reasonable compensation for his services, provided he should succeed in selling the same on terms satisfactory to defendants.

It is then averred that he found a purchaser on the 18th of April, 1894, who was ready, willing, and able to purchase on terms satisfactory to defendants. The purchaser, J. E. Carr, on that day entered into an agreement in writing with defendants whereby they agreed to sell the land for thirty-six thousand dollars, and in said writing defendants also agreed to pay plaintiff the regular commissions out of the first moneys received.

Then follows an allegation that defendants, without cause or excuse, refused to carry out their agreement with Carr, but returned to Carr his note for five hundred dollars, which had been put up by him as a forfeit. Also that the regular commission for finding a purchaser for a lot of the kind and description, and for the purchase price aforesaid, is nine hundred dollars, which is a reasonable compensation for the service.

A general demurrer was interposed to the complaint, and under it defendants now attempt to raise the point that the complaint is ambiguous or uncertain as to the terms of the employment. This objection, however, is not raised by a general demurrer.

The defendants denied the employment; that any services were rendered by plaintiff; that any sale was made to Carr; and, also, that any written contract was executed in which they agreed to pay plaintiff commissions. But the defendants admit that on the 17th of April, 1894, plaintiff came to defendants with J. E. Carr for the pretended purpose of purchasing the property and did enter into negotiations for that purpose, and did attempt to procure an agreement from defendants that they would pay him a commission in the event of a sale to Carr. But defendants deny

that they entered into any agreement in writing, or into any kind of an agreement to pay commissioners except in case of a sale, and that was not in writing and did not bind the defendants. They then aver that no sale was ever made to said J. E. Carr.

The evidence shows no valid agreement employing plaintiff to find a purchaser upon the terms set out in the complaint. There was in fact no agreement in writing by which plaintiff was employed to negotiate a sale in any terms whatever. The statute of frauds is pleaded, and one question here is whether a contract has been made out under section 1624 of the Code of Civil Procedure.

It appears that plaintiff called upon defendants, with J. E. Carr, on the 17th of April, 1894, to ascertain if the property was for sale and for what price and upon what terms. They were informed by Mr. Fay that he would sell for thirty-six thousand dollars. Mr. Carr replied that he had understood that the property could be had for thirty-two thousand dollars, and he would consider the matter. The next day the two called again and then an agreement was reached, which was reduced to writing and signed by the defendants. The contract was in form *inter partes*. The price to be paid was thirty-six thousand dollars; five hundred dollars was to be paid on signing the contract, three thousand five hundred dollars on delivery of deed, and thirty-two thousand dollars, with interest, ten years after the execution of the deed. Defendants were to furnish an abstract, and agreed "to allow the party of the second part five days to examine same after certificate, abstract of title is delivered; and further agree to pay as a commission to said S. K. Lindley the sum of regular commissions dollars out of the first money received."

The parties of the first part agreed to deliver to the party of the second part, within five days after the delivery of the abstract, a bargain and sale deed conveying the property free and clear of all encumbrances. It was also stipulated that if the title failed to prove good the contract was void, and Lindley should return the first payment to Carr.

If the party of the second part failed to make the remaining payments according to the agreement, Lindley was "authorized and empowered to declare said payment forfeited without recourse." It was nowhere provided that Carr should execute a

note or mortgage for the deferred payment of thirty-two thousand dollars, although an absolute deed was to be delivered at once.

This writing was signed by defendants, but not by Carr, and according to Lindley's testimony was handed to Carr, who handed to Mr. Fay a check for five hundred dollars.

Mr. Fay denies that the paper was handed to Carr or that there was any understanding that it was delivered. He also claims that he understood that Carr was to sign it, and that either it should be executed in duplicate, so that each party should have a copy, or that Lindley should retain it for both parties. Upon this matter the court found in favor of the plaintiffs. This finding is attacked as not supported by the evidence.

All agree that almost as soon as the defendants had signed the writing, and before they had separated, Mr. Fay stated that he did not like the provision by which the payment of the entire sum of thirty-two thousand dollars was deferred ten years. He desired annual payments. After some discussion, Mr. Carr assented to the change, and attempted to alter the instrument accordingly. He found difficulty in making the change, and said he would fill out a new blank. Mr. Fay then took the one he had signed and threw it into the fireplace. The new one was filled out, embodying the changes. The defendants signed that also. When signed, however, Mr. Fay put it into his pocket and said he desired to consult an attorney before he delivered it, and promised to meet the other parties the next morning at Mr. Lindley's office. Mr. Carr made no objection to this course. On the next day the defendants refused to go on with the trade.

There was no written contract of employment, and there is no note or memorandum of any such contract, unless the reference to commissions in the writing signed by the defendants, as above stated, constituted such memorandum. Waiving the question whether such a contract was executed so as to bind the parties, or conceding that it was, the contract which it tends to prove is not, so far as concerns the compensation, the contract which is averred in the complaint. Only one contract is averred, and that is to find a purchaser upon terms satisfactory to the defendants, for which plaintiff was to be paid a reasonable compensation. The statement as to the contents of the writing between Carr

and defendants is a mere recital in an allegation showing that Carr contracted to purchase on terms satisfactory to defendants. It does not help out or vary the averment as to employment.

Ignoring the question as to the pleading, however, the evidence shows no right of action in the plaintiff. It tends to show an agreement to pay commissions out of the first money received, and no money has ever been received. Under such a contract, the broker is not entitled to compensation when he finds a purchaser ready, willing, and able to purchase on the prescribed terms. There must be a sale and a first payment to entitle him to recover. It is so nominated in the bond.

If we assume that it is a case in which the defendants have agreed to pay out of a specified fund, and that the right to recover is based upon the fact that it is because of the wrongful act of the defendants that there is no such fund, it does not appear, either from the pleadings or the evidence, that a first payment could have been received by the defendants. It was stipulated in the alleged agreement that if the title proved bad the contract of purchase should be void. Carr never accepted the title, and it was not shown to be good. If the sale failed because the title was defective there would be no first payment, and the plaintiff could recover nothing.

But the alleged contract was never executed so as to bind anyone. It is not necessary to repeat the acts which it is claimed constituted a delivery. They were certainly at the best equivocal, and the parties separate, mutually agreeing that no contract had been executed; that Fay was to consult his lawyer, and they were to meet on the next day to close the matter. There was, therefore, no sale, and according to the terms of the contract of employment, if we concede that one was proven, the plaintiff was entitled to nothing.

Had the agreement been the ordinary one that the broker is entitled to his commissions when he furnishes a purchaser able, ready, and willing to buy, it might be argued that the memorandum was sufficient to satisfy the statute of frauds, even though the contract of purchase was not so executed as to bind the parties.

The note or memorandum need not be a contract or a writing intended by the parties as an obligation, but only a note or mem-

orandum thereof signed by the party to be charged. Under such a contract as was made in this case there must have been a sale. The terms of the proposed sale were not agreed upon in any contract between the broker and the seller, except that they were to be satisfactory to the seller and the commissions were to come out of the first money paid. Under such circumstances, a refusal of the vender to complete a sale which he at first said was satisfactory did not make him liable. He did not bind himself to his broker that he would sell at all, and his failure to complete the sale did not give plaintiff a right of action. Even had the writing been delivered, it is questionable whether, under the circumstances of this case, the defendants might not have rescinded with the consent of the vendee, and thus have defeated the claim of plaintiff. Apparently, Carr now acquiesced in the rescission. He is not insisting upon the sale, and there was testimony to the effect that failing to get this property he invested elsewhere.

The order is reversed and the cause remanded.

Henshaw, J., and McFarland, J., concurred.

[S. F. No. 729. Department Two.—December 14, 1897.]

A. G. PLATT, Respondent, v. H. B. HAVENS, Appellant.

JURY—ACTION ON CONTRACT.—An action to recover money upon a promissory note, and for the breach of a contract entered into simultaneously therewith, in which no equitable issues are raised, is an action at law, in which the defendant is entitled to a jury trial.

ID.—WAIVER OF JURY.—A stipulation to set the action for trial on a day certain before a department of the superior court then known to be engaged in the trial of causes without a jury is not a waiver of the right to a trial by jury. Such right cannot be waived by implication.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion.

T. Z. Blakeman, for Appellant

W. H. H. Hart, and Aylett R. Cotton, for Respondent.

SEARLS, C.—Appeal from a judgment of the superior court in and for the city and county of San Francisco in favor of plaintiff for \$2,628.85, upon a promissory note made by defendant for \$2,500, bearing interest after maturity at eight per cent per annum, and dated August 21, 1894. Accompanying the note was an agreement executed by the parties of which the following is a copy:

“Agreement.

“This agreement, made by and between H. B. Havens and A. G. Platt, both of San Francisco, Cal., witnesseth:

“That the said H. B. Havens hereby sells to said A. G. Platt twelve thousand five hundred (12,500) shares of the Crescent Mining Company stock, for the sum of five thousand dollars (\$5,000), payments to be made and stock to be delivered as follows:

“H. B. Havens will deliver six thousand two hundred and fifty shares of the stock upon the signing of this agreement, and the payment of two thousand five hundred dollars (\$2,500) in cash. The balance, six thousand two hundred and fifty shares of stock, will be placed in escrow with Mr. A. K. Durbrow, and upon the payment to him of the balance of the amount due, viz., two thousand five hundred dollars (\$2,500), this stock shall be delivered to A. G. Platt—the payment of this \$2,500 to be made on or before August 21, 1895.

“Any dividends that may be declared on the said six thousand two hundred and fifty shares of stock are to be paid in to Mr. Durbrow and applied upon the balance due on said stock in escrow, said amounts to be subject to order of H. B. Havens.

“It being agreed that said A. G. Platt shall at any time during the year stated have the privilege of paying up the amount due on the stock in escrow, and thereafter receive any dividends that may be declared on said stock.

“It is also understood and agreed to by the parties to this agreement, that said H. B. Havens shall, at any time on or before August 21, 1895, have the privilege of offering A. G. Platt the sum of \$2,500 and interest at the rate of eight per cent per annum from the date of this agreement for six thousand two hundred and fifty shares of stock of said Crescent Mining Company, and, should said A. G. Platt refuse such offer then the said

A. G. Platt shall relieve said H. B. Havens from any future liability in connection with this transaction.

"It is also agreed and understood that in case the foregoing offer shall not be made that the said A. G. Platt shall have the right to cancel this contract on August 21, 1895, and receive from said H. B. Havens the sum of \$2,500, as per note of even date herewith, without interest or any dividends that may have been made on such stock.

"H. B. Havens agrees that a five-stamp mill shall be placed on the property, without any expense to said A. G. Platt, in consideration of this agreement.

"(Signed) H. B. HAVENS.

"(Signed) A. G. PLATT.

"Witness:

"(Signed) A. K. Durbrow.

"Witness to signature of A. G. Platt:

"(Signed) J. R. Palmer.

"That on the margin of said agreement, opposite the clause referring to said promissory note, was a further stipulation between plaintiff and defendant made at the same time, in words as follows:

" "This note is not to be transferred or used without maker's permission, but is to be canceled upon the canceling of this agreement or payment of amount named.

" "(Signed) H. B. HAVENS.

" "(Signed) A. G. PLATT."

The first point made by appellant for reversal was that the cause of action was one at law, and that the court below erred in denying to defendant a jury trial. The facts bearing on the question are as follows:

The cause was pending in Department 4 of the superior court. On the twentieth day of December, 1895, the attorneys for the respective parties stipulated as follows: "It is hereby stipulated between the parties to the above-entitled action that said action may be set down for trial at such time as will suit the convenience of the court on any day after the 15th of January, 1896."

The action was set for trial March 3, 1896, and not being reached was reset for March 13, 1896.

Again, it was apparent that the cause would not be reached, and the attorneys for the respective parties met the judge of the court at his chambers to arrange a future day for trial, and then and there counsel for defendant announced that he had not waived a jury trial, and insisted upon his right to a trial by jury. The judge then postponed the trial for one week, and directed counsel "to make his demand for a jury trial in open court."

Thereupon, and in open court, on March 13, 1896, such demand for a jury trial was made. The court, on the 16th of the same month, denied the application for a jury trial, "on the ground that the action was one in which the parties were not entitled to a jury trial." Defendant excepted.

It may be stated, also, that Department 4 of the superior court was and for two years had been engaged in the trial of court cases, and had not during that period had a jury in attendance, and that the regulation to this effect was notorious.

The action is to all intents and purposes one at law to recover money upon a promissory note, and for the breach of the contract entered into simultaneously therewith.

Plaintiff averred that he had complied with all the conditions to be by him kept and performed, but that defendant had violated the contract, etc. The contention of the respondent that plaintiff might have enforced a lien upon the stock mentioned in the agreement cannot be upheld, for the reason that there are no facts stated in the complaint going to uphold any such lien, but, on the contrary, the whole theory of the complaint is, that plaintiff rescinded the agreement, as he had a right to do, by tendering a return of the stock and demanding payment of the note, and he offers to return the stock to defendant, to surrender it in court, etc.

There was no case that could be made consistent with the issues that would entitle plaintiff to equitable relief.

We think, therefore, that the court erred in holding, as it did, that the cause was one in which the parties were not entitled to a jury trial.

Respondent contends, however, that if it be conceded that the court was wrong in the reason which it gave for refusing a jury to defendant, it was still right in its conclusion, because defendant had by the stipulation in effect waived a jury. Trial by jury

may be waived: "1. By failing to appear at the trial; 2. By written consent . . . filed with the clerk; 3. By oral consent, in open court, entered in the minutes." (Code Civ. Proc., sec. 631.)

The stipulation of the attorneys was entirely consistent with the idea of a trial either with a jury or by the court. It is only by ingrafting therein the fact that there was no jury for that department of the court, and that such fact was notorious, that the stipulation becomes of any force.

We think this too vague and uncertain a basis upon which, in the face of our code, to found a waiver. It was held in an early case (*Smith v. Polack*, 2 Cal. 92) that the right of trial by jury cannot be waived by implication.

In *Swasey v. Adair*, 88 Cal. 179, it was held that a jury trial can only be waived in one of the modes prescribed in section 631, *supra*.

In *Biggs v. Lloyd*, 70 Cal. 447, it was held that the right to a jury trial is not waived by neglecting to demand a jury at the time the case is called to be set for trial, notwithstanding a rule of court that a jury shall then be demanded.

For the reasons given in these cases, we think there was no waiver of a jury in the manner prescribed by law, and that the court below erred in its ruling.

We recommend that the judgment be reversed and the cause remanded.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[S. F. No. 372. In Bank.—December 14, 1897.]

ALASKA IMPROVEMENT COMPANY, Respondent, v.
CHARLES HIRSCH et al., Appellants.

INJUNCTION BOND—PREVIOUS ISSUANCE OF RESTRAINING ORDER—CONSIDERATION—ORDER FOR BOND UPON MOTION OF DEFENDANT—RECITALS.—Where a restraining order was issued in a United States circuit court without requiring the plaintiff to execute a bond, and a bond was subsequently required to be given upon motion of the defendant by an order which did not purport to make the continuance of the restraint conditional upon the giving of the bond, and where the bond given recited the issuance of the restraining order and the order requiring the bond, and that it was given "in consideration of the premises, and of the issuance of the restraining order," but did not recite that it was executed to obtain a continuance of the restraining order, such bond is void for want of consideration, and no action can be maintained thereupon, and a judgment thereon will be reversed.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. A. A. Sanderson, Judge.

The facts are stated in the opinions.

John H. Miller, and Albert C. Aiken, for Appellants.

Daniel Titus, for Respondent.

TEMPLE, J.—Action upon an injunction bond. Defendants appeal from the judgment and from an order denying a new trial.

An action was brought against plaintiff in the United States circuit court to enjoin it from using a certain trademark and label. October 23, 1890, a temporary restraining order was made, pending an order to show cause why an injunction *pendente lite* should not be issued. Both orders were served on that day. On the next day, counsel for the defendant in the injunction suit, plaintiff here, "moved the court for an order requiring complainant to give a bond in the sum of ten thousand dollars conditioned for the payment to respondent of such damages as it may be awarded, by reason of the issuance of said temporary restraining order, if the court should finally determine that complain-

ant was not entitled thereto." The order was made as requested.

The bond sued upon was given in pursuance of that order. It recited the issuance of the restraining order and the order requiring the bond, and that "in consideration of the premises and of the issuing of said restraining order" the sureties undertake in the penal sum of ten thousand dollars, and promise for complainant that he would pay all damages sustained by the defendant in that suit, by reason of the restraining order, if the court should finally determine that the complainant was not entitled to it. The court finally so held.

The defendants contend that the bond is absolutely void for want of consideration, and I think the contention must be sustained. The word "premises" in the bond refers, of course, to the recitals as to the bringing of the suit, the restraining order, and the order requiring the bond. The bond contains no recital to the effect that it was executed to obtain a continuance of the restraining order, and if it did such recital would amount to nothing unless it appeared in the order requiring the bond, or at least in some mode, that a bond was necessary to a continuance of such order. It does not appear that the restraining order was continued in force at all by reason of the bond, or that by giving it the plaintiff in the injunction suit gained any advantage whatever: The order requiring the bond did not make the continuance of the restraint conditional upon giving the bond, and in no way is it made to appear that the restraining order would have been dissolved if the bond were not given. The court could make the restraining order without a bond, and it was just as good for the plaintiff in that suit without a bond as with one.

It is said that the court could have dissolved the restraint if the bond had not been given, and since the judge required the giving of the bond, and thereby indicated his opinion that the defendant, who was enjoined, was entitled to one, it is to be presumed that he would have so acted. There is no presumption in the matter, and if there were it would not change the fact that the bond when given was without consideration. The judge could have dissolved the injunction although a bond had been given, but in neither case can we suppose that the injunc-

tion would have been dissolved without a notice and a hearing, nor until the plaintiff in that suit had been afforded an opportunity to give the bond after the alternative had been presented to him—in short, after a bond had been lawfully demanded.

But if the question of a dissolution of the restraining order was left for the future consideration of the court, and it would not have been dissolved by a failure to give the bond, then the giving of it did not secure its continuance. In principle, therefore, the case is on all fours with *Carter v. Mulrein*, 82 Cal. 167, 16 Am. St. Rep. 98, where the bond was given after the issuance of an injunction, but recited that it was given in consideration of its issuance. The decision is not made to turn, as suggested, upon a misrecital of the facts, but because the undertaking, having been given after the issuance of the writ, could not be considered as given in consideration of its issuance. It was therefore without consideration and void. In *Lambert v. Haskell*, 80 Cal. 611, the order expressly provided that the injunction should not continue unless the undertaking was given. The sureties contended that they could stand upon the letter of their contract, and as the bond did not recite such consideration, but, as they contended, a different and a void consideration, to wit, the previous issuance of the injunction, it was void. The court there, as distinctly as in *Carter v. Mulrein*, *supra*, recognized the fact that if the undertaking was given in consideration of the previous issuance of the writ it was void, but agreed that, under the circumstances, they were authorized to hold that the undertaking was given in consideration of the continuance of the injunction. In that case the order required the undertaking as a condition to the continuance of the restraint, and it was given in order to obtain such continuance. The recital of the consideration was not within the rule that a surety may stand upon the letter of his bond. The rule only has reference to the extent and measure of the liability of the surety. He cannot be held to have contracted to do more than he said he would do. Proof of a consideration for such a contract can be made as in other cases. Here, the giving of a bond was not made to affect the continuance of a restraint, therefore the continuance of the restraint could not have been a consideration for the bond, even though it had been so recited in the bond.

If these views are correct the other points made become immaterial.

The judgment and order are reversed.

Harrison, J., and Henshaw, J., concurred.

BEATTY, C. J., concurring.—I concur in the reversal of the judgment. The only possible consideration for the undertaking of the defendants was the continuance in force of the restraining order. Whether that was in fact the consideration was an issue clearly made by the pleadings, and that the fact was material cannot be doubted. But upon this material issue there is no finding. Matters of evidence are found from which the material fact might be inferred, but that is not sufficient to support the judgment.

VAN FLEET, J., and McFARLAND, J., dissenting.—We dissent. We think the conclusion reached in Department correct, and adhere to the views expressed in the opinion there filed.

The following is the opinion filed in Department Two, December 17, 1896:

HAYNES, C.—Action upon an injunction bond. The plaintiff had findings and judgment in its favor, and this appeal is from the judgment and an order denying defendants' motion for a new trial.

The action in which said bond was given was brought by the Alaska Packers' Association, a corporation, against the plaintiff herein, the Alaska Improvement Company, in the circuit court of the United States for the ninth circuit, northern district of California, the sole object of which was to obtain an injunction against the said Alaska Improvement Company enjoining and restraining it from using a certain label and trademark, which the said Alaska Packers' Association claimed the exclusive right to use, and which it was alleged said Alaska Improvement Company was then using in its said business, and had placed upon about five thousand cases of its salmon.

Said suit was commenced on the twenty-third day of October, 1893, and, upon filing the bill of complaint in said circuit court,

a temporary restraining order was granted, and an order made requiring the defendant therein, the Alaska Improvement Company, to show cause at a future day why an injunction should not be granted pending the litigation. Said restraining order and order to show cause were duly served upon the defendant in said suit the same day, and on the next day the defendant in said suit (the plaintiff in this action), upon its motion, obtained an order from said court "requiring complainant to give a bond in the sum of ten thousand dollars, conditioned for the payment to respondent of such damage as it may be awarded by reason of the issuance of said temporary restraining order, if the court should finally determine that complaint was not entitled thereto."

The bond given in pursuance of said order, and upon which this action was brought, is as follows: "Whereas, the above-named complainant has heretofore commenced the above-entitled suit in the circuit court of the United States, ninth circuit, northern district of California, against the above-entitled respondent, and has applied for and obtained a preliminary restraining order in said suit against the said respondent, enjoining and restraining it from the commission of certain acts, as more particularly specified in the said restraining order;

"And, whereas, thereafter, to wit, on October 24, 1893, said respondent applied to said court for an order requiring the complainant to make and execute to respondent an undertaking on said restraining order, conditioned as hereinafter specified;

"And, whereas, said court has granted said motion and fixed the amount of said undertaking in the sum of ten thousand dollars;

"Now, therefore, in consideration of the premises and of the issuing of said restraining order, we, the undersigned, residents of the state of California, do jointly and severally undertake, in the penal sum of ten thousand dollars, and promise to the effect that said complainant will pay to the said respondent such damages, not exceeding the sum of ten thousand dollars, as said respondent may sustain by reason of said restraining order, if the said court shall finally decide that the said complainant was not entitled thereto."

The first point made by appellant is that the court failed to find upon material issues raised by the answer.

The complaint alleged that: "The said defendants undertook upon consideration of the issuance of said injunction, and the continuation of the same, etc." The answer denied that the continuation of the restraining order was any part of the consideration. The court found "That upon the granting of said injunction by the circuit court no bond of indemnity was required by the said court or the judge thereof, but on the day following, to wit, on the twenty-fourth day of October, 1893, on motion of the defendants in that action, the plaintiff in this, the circuit court ordered the said Alaska Packing Association to make and enter into the bond set out in plaintiff's complaint herein. That under and in pursuance of said order the said defendants in this action made, executed, and filed in said court and cause the bond set out in plaintiff's complaint."

Whether the continuance of the restraining order was the consideration of the bond, in whole or in part, is a question of law to be determined from the order and the bond, the interpretation of which is within the province of the court. Even if it should be regarded as a conclusion of fact, the order and the bond were the only competent evidence by which the consideration could be shown.

The correctness of this conclusion is apparent from appellant's second and principal point, viz: that the only consideration for the making of the bond was the issuance of said restraining order; that the restraining order having been issued and served, there was no consideration for the bond; and that the bond was not given in consideration of the continuance of said restraining order.

It is conceded that a surety has a right to stand on the express terms of his contract, and that a past or executed consideration is not sufficient to support his promise. But we think that the recitals of the bond and the consideration expressed therein are sufficient.

The bond recites the prior commencement of the action, that a preliminary restraining order had issued, that afterward the respondent in said action applied to the court for an order requiring the complainant therein to make and execute "an undertaking on said restraining order conditioned as hereinafter specified," and further recited that said motion was granted, and

that the amount of the undertaking was fixed by the court, and the obligatory part of the undertaking in which the expressed consideration upon which it is made is as follows: "Now, therefore, in consideration of the premises and of the issuing of said restraining order, we, the undersigned," etc.

It is thus apparent that the "issuing" of said restraining order is not the only consideration for the execution of the bond. The word "premises" expresses part of the consideration. The word "premises" means "that which is before; introduction; statements previously made." (Bouvier's Law Dictionary.)

In Rapalje and Lawrence's Law Dictionary the word "premises" is defined as follows: "In the primary sense of the word, 'premises' signifies that which has been before mentioned; thus, after a recital of various facts in a deed, it frequently proceeds to recite that in consideration of the premises, meaning the facts recited, the parties have agreed to the transaction embodied in the deed."

The said recitals in said bond clearly show the previous issuance and present existence of said restraining order, and that the application for an undertaking was made in view of its existence, and, therefore, of its intended continuance. Besides the obligatory part of the bond is not that the sureties therein will pay such damages as the defendants in that action might sustain by reason of its issuance simply, but their undertaking and promise is that they will pay to the "respondent such damages, not exceeding the sum of ten thousand dollars, as said respondent may sustain by reason of said restraining order."

It is said, however, that the circuit court had power, under section 718 of the Revised Statutes of the United States, to issue such restraining order without requiring any bond or security, and that the order requiring a bond did not provide that, upon a failure to give it, it should be dissolved; and that, therefore, it must be assumed that the continuance of the restraining order did not depend upon the giving of the bond. It is quite true that the court might have rescinded its order requiring a bond to be given, or, upon the other hand, upon the failure to give it, might have discharged the restraining order. The fact, however, is that the bond was given and the restraining order remained in full force, so that all the benefit the complainant

could derive from the restraining order was realized, and all the injury inflicted thereby upon the respondent herein was suffered.

This case is broadly distinguishable from that of *Carter v. Mulrein*, 82 Cal. 167, 16 Am. St. Rep. 98, cited by appellant. In that case the order was that an injunction issue upon the filing of the bond. The writ was issued without the filing of the bond, and the bond then in controversy was dated and issued several days after the issuance of the writ. The bond in that case recited the order that upon the filing of the bond a writ of injunction should issue, and the consideration expressed in the bond was as follows: "That now, therefore, in consideration of the premises and that said writ of injunction may issue, we undertake," etc. No writ was issued after the filing of the undertaking. It was held, as we think rightly, that the bond was without consideration. The sureties there were not, as here, charged with notice that the injunction had already issued.

A case much more nearly in point is that of *Lambert v. Haskell*, 80 Cal. 611. In that case, a preliminary injunction had been issued on an insufficient undertaking, and upon a motion to dissolve it was ordered that the injunction be dissolved unless a proper undertaking be given. In response to that order the undertaking was given, and the consideration expressed in the new bond is as follows: "Now, therefore, we, the undersigned, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake, in the sum of ten thousand dollars, and promise to the effect that in case said injunction shall issue the said plaintiffs will pay," etc.

The court said: "If the language had been 'in case said injunction shall be continued in force,' instead of 'shall issue,' there could have been no doubt. The question is, therefore, whether the words 'shall issue' can be construed to mean 'shall continue in force.' Now, we think that there might be cases in which the circumstances show that the two phrases were used as equivalent to each other." The execution of the bond is admitted by the defendants, and, as it recites the pendency of the suit and the previous issuance of the temporary restraining order, the defendants are conclusively charged with knowledge of those facts. (*Pierce v. Whiting*, 63 Cal. 540.) And not only

so, but the very condition of the bond is that they will pay such damages "as said respondent may sustain by reason of said restraining order," thus expressly admitting a liability for its continuance. The provision of the Civil Code, section 2836, that "a surety cannot be held beyond the express terms of his contract," must be read in connection with other provisions of the same code. The next section (section 2837) is as follows: "In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts."

Section 1636 of the Civil Code provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." So, "a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, sec. 1643.) Interpreted by these rules, we think the bond is not open to appellants' objection that it was without consideration, but that it was given in compliance with the obvious purpose and intent of the order of the court.

Appellants further contend that this action was prematurely brought, inasmuch as the time for appeal from the judgment of the circuit court had not expired.

The complaint alleged that a final judgment had been entered in that action. To this the defendants answered that it had not yet become final "in the sense contemplated by the said bond, for the reason that said judgment or decree, if ever made or entered at all, was not made or entered prior to the twentieth day of July, 1894, and that under and by virtue of the laws of the United States in that behalf made and provided, the complainant in that suit had the right to appeal to the circuit court of appeals of the United States from the said judgment and decree at any time within six months from said twentieth day of July, 1894."

In support of their said contention appellants cite section 1049 of the Code of Civil Procedure, which reads as follows: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

We are not cited to any case where it has been held that an action upon an injunction bond will not lie until the time for appealing the case in which it was given has expired, nor have I found any case where that question has been directly raised. The cases upon injunction bonds are numerous, and all seem to assume that when a final judgment has been entered by the court in the suit in which the bond was given, an action upon the bond may be brought. But we think it is not necessary here to decide that question. The answer only alleges that the time for taking an appeal had not elapsed, and does not allege that the judgment had not been satisfied, while under the code provision relied upon by appellants a satisfaction of the judgment makes it final, though the time for appeal has not expired, and, if necessary to support the judgment against the sureties, we must assume, in the absence of allegation or proof to the contrary, that the judgment in the circuit court had been satisfied. That judgment was that the complainant take nothing by its action, and that the respondent recover its costs, and upon the trial of this case in the court below it was stipulated and agreed between the parties "that no damages of any kind were assessed or awarded to the defendant in that suit, except the costs of the court which were awarded in the usual manner and duly paid by the complainant." In the light of the fact that satisfaction of the judgment was not negatived in the answer, we must assume that it was satisfied at the date of its entry.

Appellants further contend that the items of damage, making up the aggregate of two thousand one hundred and ninety-five dollars, are not segregated or itemized in the finding (except as to counsel fees), and said finding is also attacked as not justified by the evidence.

In the testimony of Mr. Madison the several items of damage and the amount of each are stated, aggregating a larger sum than that stated by the court in its finding, so that there was evidence tending to sustain the finding as to the total amount. We have, however, gone over the testimony of Mr. Madison as to each item enumerated by the witness, and think his evidence would have justified the court in finding a slightly larger sum (aside from attorneys' fees) than that for which judgment was rendered.

We think the item of five hundred and twenty dollars, loss on salmon purchased, should not be wholly disallowed, as appellants claim, but that at least one hundred and thirty-five dollars thereof might be properly allowed. Reducing that item as above, and excluding the item of interest (three hundred and fifteen dollars) and the twenty dollars paid for transcript, our computation exceeds that of the court below by six dollars and fifty cents, as to the damages, aside from attorneys' fees which will be considered separately.

It would have been convenient if the damages had been itemized, but we know of no rule requiring it, at least in the absence of a request for a finding upon each item.

The findings show that one thousand dollars was allowed as attorneys' fees for services rendered in procuring a dissolution of the injunction. We think no part of this sum should have been included in the damages awarded the plaintiff.

That sum was paid counsel, and it was all that was paid him for his services in the case. It is claimed, however, that no other services of value were rendered. There was no motion made to dissolve the preliminary restraining order. If the order to show cause why an injunction should not be granted pending the suit had not been accompanied by the restraining order, all the services that were in fact rendered upon the hearing of the order to show cause would have been necessarily performed in preventing the granting of that order, and in such case it is well settled that attorneys' fees are not allowed. The restraining order by its very terms could only continue until the decision of the order to show cause, and denial of an injunction *pendente lite*, upon the hearing of that order, necessarily terminated the existence of the restraining order. It is true it had the effect of showing that the restraining order should not have been granted, and entitled the party enjoined to recover damages suffered during its continuance, and these have been properly allowed; but it does not follow that counsel fees for services in defeating the order to show cause can be allowed as damages sustained by reason of the previous existence of the restraining order, any more than attorneys' fees for services upon the final trial of the cause in preventing a perpetual injunction could be allowed as damages because the denial of a per-

petual injunction necessarily dissolved an injunction granted *pendente lite*.

The recent case of *Curtiss v. Bachmann*, 110 Cal. 433, 52 Am. St. Rep. 111, is conclusive of this question and relieves us from its further discussion.

It is also contended that three days intervened between the issuing of the injunction and the giving of the bond, that much of the damages accrued during that time, and that the sureties are not liable therefor. We think the consideration stated in the recitals and conditions of the bond covered the whole time from the service to the dissolution of the restraining order, but, if it were otherwise, the defendants should have raised the question by objecting to plaintiff's evidence which apparently covered the whole of said period, or have sought to segregate and exclude the portion of damages accruing before the bond was executed, or in some way raised the question in the court below. Besides, we do not find any specifications of error which presents that question.

The judgment should be modified by deducting therefrom said sum of one thousand dollars, and as so modified the judgment and order appealed from should be affirmed, the appellant to recover the costs of this appeal.

[S. F. No. 632. Department Two.—December 14, 1897.]

PHILIP ROHRBACHER, Respondent, v. F. C. KLEEBAUER, Appellant.

ACTION UPON NOTE—INSUFFICIENT DEFENSE—CONSIDERATION—FRAUD IN SALE OF STOCK OF CORPORATION—TRANSFER OF CORPORATE ASSETS—RESCISSION—INCOMPLETE RESTITUTION.—In an action upon a promissory note, in which the answer pleaded a want of consideration and a total failure of consideration, and alleged that the note was given for the purchase price of shares of stock in a Colorado corporation, of which plaintiff was president and managing agent, and that defendant was induced to purchase the stock by fraudulent representations of the defendant upon which he relied, and that the assets of the corporation were transferred to a new corporation which assumed its liabilities, and that defendant was induced to surrender the original stock purchased and accept the same number of shares in the new corporation in lieu thereof, and that the con-

tract of purchase was rescinded, and said shares of stock tendered back to plaintiff on account of said fraud; but the evidence disclosed that part of the assets of the original corporation were transferred to a dredging company not referred to in the answer, and that the defendant received stock in both corporations, in lieu of the stock purchased, and had sold all of his stock in the dredging company, the defendant could not defeat the action upon the note and retain any part of the consideration, but the tender of all the stock received in both corporations was essential to a rescission or right of rescission of the contract of purchase, and judgment was properly rendered in favor of plaintiff for the amount of the note.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Charles W. Slack, Judge.

The facts are stated in the opinion.

J. J. Stephens, and Reddy, Campbell & Metson, for Appellant.

W. S. Goodfellow, and R. H. Countryman, for Respondent.

HAYNES, C.—This action is prosecuted to recover from the defendant five thousand five hundred dollars and interest, upon a promissory note made by defendant to plaintiff on December 27, 1890, due six months after date.

The answer contains several defenses, alleging separately that there was no consideration for the note, that the consideration had wholly failed, and also alleged that said note was given for the purchase price of two thousand shares of the stock of the River, Harbor, and Canal Dredging and Land Company, a corporation organized under the laws of the state of Colorado, of which the plaintiff was president and managing agent, and that he was induced to purchase said stock by and through the fraudulent misrepresentations of the plaintiff upon which he relied; the particulars of which need not be stated, as no question is made upon its sufficiency. It is sufficient to say that the alleged false representations were as to the value of a large tract of salt marsh land owned by the corporation, its sound financial condition, and the value of its stock.

These issues were tried before a jury. The plaintiff put in evidence said note and rested; and at the conclusion of defendant's evidence, upon request of plaintiff, the court instructed the

jury to return a verdict for the plaintiff for the amount of the note and interest, as prayed for, and defendant excepted. This appeal is from the judgment entered thereon and from an order denying a new trial. Whether the court erred in so instructing the jury is the only question noticed in the briefs.

Much of the defendant's evidence related to the indebtedness of the corporation and the value of its land. That evidence need not be repeated, however, as we shall assume, for the purposes of this opinion, that the allegations of the answer in that respect are true. Nor need we consider whether defendant relied, or was entitled to rely, upon plaintiff's representations as to the value of the stock, or the financial condition of the River Harbor, and Canal Dredging and Land Company, nor how far those statements were of material facts or the mere expression of opinion, since the defense is based upon an alleged rescission of the contract of purchase, the right to rescind resting upon the alleged fraudulent misrepresentations.

It is alleged in the answer that the Dumbarton Land and Improvement Company was incorporated December 22, 1891, and that the assets of the Colorado corporation were transferred to it, and that it assumed the liabilities of the prior corporation, and that defendant was induced to surrender the stock he purchased from the plaintiff in December, 1890, and accept therefor two thousand shares in the new corporation. But the evidence discloses that the Colorado corporation, in addition to the land mentioned, also owned certain Boschke patents for dredgers; that at the same time that the Dumbarton Land and Improvement Company was formed another corporation known as the Western Dredging Company was also formed, to which said Boschke patents were transferred by the Colorado corporation, and when defendant surrendered his stock in the Colorado corporation he received not only the same number of shares in the Dumbarton Land and Improvement Company, but also two thousand shares in the dredging company; and the Colorado corporation was thereupon discontinued. These shares in the new corporations were delivered to defendant January 19, 1892, and at that date defendant paid on account of interest on his note three hundred and thirty dollars. About six months after the new stock was delivered an assessment was levied by the

Dumbarton Land and Improvement Company, and defendant saw the plaintiff about it and complained that that was not as he "stated the stock in the first place," and was told by plaintiff that he had to have money to pay the interest on the mortgage; that defendant then offered him back the stock; plaintiff would not take it, saying that "he didn't want the stock, he wanted money." Defendant, however, paid that assessment, amounting to five hundred dollars. About six months later there was another assessment levied by the Dumbarton company, and defendant again offered plaintiff the stock, but it was not accepted. Defendant then tried to sell the stock both in this city and San Jose, but without success. He did not pay the second assessment, and the Dumbarton stock was sold for that assessment. He admitted that upon the surrender of his stock in the Colorado corporation he received in exchange two thousand shares in the Dumbarton Land and Improvement Company and two thousand shares in the Western Dredging Company, though he afterward denied that he got four thousand shares, and said he understood it was one company; but it was stipulated that two thousand shares in each corporation was delivered to defendant, and prior to the above denial defendant was asked: "Q. Have you the shares of stock in the Western Dredging Company? A. No. Q. What have you done with them? A. I sold them."

Mr. Stephens, called for defendant, testified that on behalf of defendant he offered to return the Dumbarton Land and Improvement Company stock upon the cancellation of defendant's note, but did not offer to return the stock of the dredging company; that, like defendant, he thought there was but one corporation.

It is clear that the stock in the dredging company was never tendered or offered to plaintiff, nor was it in any manner accounted for except by defendant's statement that he sold it, nor was it shown to have been worthless.

Waiving the question whether the payment of the first assessment, after learning of the debts and mortgage, was a ratification of the original purchase, with knowledge of the facts, it is clear that the tender of all the stock was essential to a rescission or right of rescission of the contract of purchase.

In order to rescind "he must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that the party shall do likewise, unless the latter is unable or positively refuses to do so." (Civ. Code, sec. 1691, subd. 2.) The refusal of the plaintiff to rescind was based upon the offer of the defendant to restore part of the stock; but, if it were otherwise, it was essential to the right of defendant to obtain a judgment of rescission, that he should produce in court, for the benefit of the plaintiff, the stock of the dredging company. He could not defeat the action of the plaintiff and retain any part of the consideration of the note. (*Maddock v. Russell*, 109 Cal. 426, and cases there cited.)

The judgment and order appealed from should be affirmed.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 283. Department Two.—December 14, 1897.]

E. C. LYLES, Respondent, v. E. B. PERRIN, Appellant

PURCHASE OF LAND AND WATER RIGHT—IMPROPER TRANSFER AND CANCELLATION OF WATER RIGHT BY VENDOR—ACTION FOR DAMAGES—INSTRUCTIONS AS TO PUNITIVE DAMAGES.—In an action for damages for the improper transfer and cancellation of a water right by the defendant, after plaintiff had purchased from defendant a tract of land with such water right appurtenant thereto, and had received a deed therefor, but prior to its recordation, where the complaint avers that the acts of the defendant were done "willfully, without any right whatever, from wanton motives, and without plaintiff's consent and knowledge, and under circumstances of great hardship and oppression to plaintiff," and the answer averred that they occurred inadvertently and without any intent to oppress plaintiff or maliciously injure him, and the evidence was conflicting as to the actual damage suffered, the question whether or not plaintiff was entitled to punitive damages is material; and where the court instructed the jury that "in any action for the breach of an obligation not arising upon contract, where the defendant has been gail-

ty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant," the defendant is also entitled to have the jury fairly instructed as to the general principle of law governing the matter of punitive damages, upon his theory of the case, and though not entitled to an instruction that there was no evidence which would warrant any punitive damages, nor to any instructions containing too narrow a statement of the principle upon which punitive damages may be given, he is entitled to have the jury instructed that "a tort committed by mistake, in the assertion of a supposed right, or without any actual wrong or intention, and without any such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of punitive damages," and a refusal to give such instruction is ground for reversal.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. E. W. Risley, Judge.

The facts are stated in the opinion of the court.

M. K. Harris, for Appellant.

Harris & Hubbard, for Respondent.

McFARLAND, J.—This is an action for damages; the jury returned a verdict in the sum of fifteen hundred dollars, for which amount judgment was entered in favor of plaintiff; and from the judgment and order denying a new trial the defendant appeals.

Plaintiff purchased a tract of land from defendant, together with a certain water right appurtenant thereto; and it is averred in the complaint that afterward, and before the deed was recorded, which defendant made to plaintiff of the land and water right, the defendant sold and granted away said water right, and had it canceled and severed from the land; and damages are asked for these acts. It is averred that the defendant did "cause the water right on said lands to be canceled, and did sell and convey the same away from plaintiff, to his great damage;" and that this was done "willfully, without any right whatsoever, from wanton motives, with reckless disregard to the rights of plaintiff and without plaintiff's consent and knowledge, and under circumstances of great hardship and oppression to plaintiff." It

was averred and contended by defendant that the granting and cancellation of the water right occurred inadvertently and without any intent to oppress plaintiff or maliciously injure him. The evidence as to the actual damage suffered by plaintiff on account of the said acts of defendant was conflicting; and the question whether or not he was entitled to punitive damages was therefore material. The court recognized the materiality of this question by giving of its own motion instruction number 5, which is as follows: "In any action for the breach of an obligation not arising upon contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant;" and this was the only instruction given by the court upon the subject of punitive damages. The defendant, however, asked some instructions upon this subject, which were refused. Instruction 15, asked by the defendant, by which the court was requested to instruct the jury substantially that there was no evidence in the case which would warrant any punitive damage, was properly refused. We think that defendant's instruction number 24 was also properly refused. There were also some other instructions upon this subject asked by defendant which were properly refused, because they contained too narrow a statement of the principle upon which punitive damages may be given. But instruction number 28, asked by defendant, was a correct statement of the law upon the subject; and under the circumstances of this case defendant was entitled to have it given. It is as follows: "A tort committed by mistake in the assertion of a supposed right or without any actual wrong intention, and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of punitive damages." The averments of the complaint, and the one instruction given by the court of its own motion above quoted upon this subject of punitive damages, presented that subject to the jury, and the defendant was entitled to have the jury fairly instructed as to the general principle of the law which governs the matter of punitive damages. For this reason the judgment must be reversed.

Judgment and order denying motion for a new trial are reversed, and cause remanded.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[Crim. No. 311. Department Two.—December 14, 1897.]

THE PEOPLE, Respondent, v. CHARLES SEARS, Appellant.

CRIMINAL LAW—BURGLARY—EVIDENCE—OWNERSHIP OF TRUNK CONTAINING STOLEN PROPERTY—PREVIOUS BURGLARY AND THEFT OF TRUNK—CLAIM—POSSESSION OF CONTENTS.—Upon the trial of a defendant accused of burglary with intent to commit larceny, where there was evidence for the prosecution showing that a burglarious entry had been made into a house by two men, and that a trunk standing in the hall had been rifled by them, and clothing, an album and jewelry taken therefrom, it was proper for the prosecution to prove, as corroborative evidence, that defendant was the owner of a trunk in which most of the stolen property was found; and even if the record had disclosed that defendant had been prosecuted upon another charge of burglary wherein it was alleged that he had stolen the trunk, it would still be competent to show that he owned or claimed the trunk in question, as furnishing evidence of possession of its contents.

ID.—INSUFFICIENCY OF EVIDENCE—ALIBI—PROVINCE OF JURY.—Where the evidence for the prosecution showed that the stolen clothing, album, etc., were found in a trunk kept by defendant in a barn owned by another person, and that some of the stolen jewelry was found in his pockets, and that the burglary occurred between 10 and 11 o'clock at night, and there was evidence for the defendant tending to prove that defendant was elsewhere employed until about 11 o'clock on that night, and defendant attempted to account for his possession of the stolen property by saying he was a junk dealer, and that on the next morning he found the goods in a gunny-sack standing against a tree on the corner of two streets, and that he put them in the barn because he was afraid the woman with whom he lived near the barn would take them, the jury was the sole judge as to the guilt or innocence of the defendant, and may have disbelieved the testimony tending to prove an alibi, or that there was a mistake as to the hour when he quit work, or as to the time of the burglary, and their verdict cannot be disturbed upon appeal for insufficiency of the evidence to support it.

ID.—CROSS-EXAMINATION OF DEFENDANT—IMPROPER QUESTIONS—HARMLESS ACTION OF PROSECUTING OFFICER—RULINGS OF COURT.—Where some of the questions put to the defendant upon his cross-exami-

nation were improper, but were of little moment, and objections thereto were sustained by the court, and when any of them were answered without objection, the answer was stricken out by the court and the jury instructed to disregard such testimony, no injury resulted from such improper questions, and a judgment of conviction of the defendant will not be reversed for alleged misconduct of the prosecuting officer in asking them.

ID.—IMPEACHMENT OF DEFENDANT—PREVIOUS CONVICTION OF FELONY.—Although it is not proper to show that the defendant was guilty of some other offense, for the purpose of raising a presumption, either of law or fact, of his guilt in the case under consideration, yet, when a defendant offers himself as a witness in his own behalf he may be asked, for the purpose of impeaching his evidence, if he has been convicted of a felony, or the fact, if it exists, may be shown by the record of the judgment.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion.

Blakely & Barber, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

SEARLS, C.—The defendant was informed against for burglary alleged to have been committed in the county of Los Angeles December 4, 1896, by unlawfully, feloniously, and burglariously entering the house, room, and building of one Louisa Massett, with intent then and there to commit the crime of larceny.

Upon his plea of "not guilty" a trial was had and a verdict returned of guilty of burglary in the first degree, upon which verdict defendant was sentenced to imprisonment in the state prison at Folsom for a term of five years. Defendant appeals from the judgment and from an order denying his motion for a new trial.

The first point made for reversal is based upon the ruling of the court permitting an answer to the following question propounded to Peter McIntyre by the prosecution: "Q. Do you know whether the defendant had any trunks around that Dutchman's place over there, or around his own place?" The objection was that the question was "incompetent, irrelevant, and immaterial."

The answer to the question was: "I saw Mr. Steele [one of the arresting officers] had a trunk in the patrol wagon, loaded up, that I think he took out of the Dutchman's place from that old sack barn."

In answer to further questions the witness said he saw Mr. Talamantes (another police officer) look over some stuff, some clothes, which the policeman overhauled. He saw clothes. "I think I seen these clothes in the trunk" (alluding to exhibits in the case and identified as having been stolen).

To the better understanding of the question, and the pertinency of the testimony, it is proper to state that there had been evidence previously introduced tending to show that one Mrs. Louisa Massett was the landlady of the upper floor of the house, 804 South Olive street, and that one of the rooms on the floor was occupied by Mrs. Mary Rasmusen, who kept her clothing, etc., in a trunk placed in the hall. On the night of December 4th, Mrs. Rasmusen and one Mrs. S. Jensen went to bed a little after 10 o'clock P. M.

Shortly thereafter they heard a noise in the hall—footsteps and voices. The women gave an alarm, went on the front porch, called for the police, etc., two men ran down the stairs into and along the street, one of them with a sack on his back. The trunk of Mrs. Rasmusen had been rifled of clothing, an album, jewelry, etc. The clothing, album, etc., were found in a stable near defendant's house, owned by an old German, in which defendant kept his horse. Some jewelry was found in defendant's pocket. The clothing, album, and jewelry were identified as the property of Mrs. Rasmusen, and as having been taken from her trunk.

The officer who made the arrest, after telling of the finding the clothing in the stable, said: "At the time I arrested the defendant I asked him where he got all of those things, the exhibits in this case among them, and he said he found them in an alley; he said that he took them over to the Dutchman's place because he knew the officers were coming there to arrest him; the things were in a stable where he had a horse. I took some things out of his pockets at the time I arrested him."

Upon this testimony it was entirely proper for the prosecution to prove, if it could, as corroborative evidence that defendant was the owner of the trunk in which some of the stolen property was found, and there was no error in the ruling of the court.

The contention of the learned counsel for the appellant that defendant had been prosecuted on another charge of burglary, wherein it was alleged he had stolen a trunk, etc., was not disclosed by anything in the record, and had it been it would have been competent to show that he owned or claimed the trunk in question, as furnishing evidence of possession of its contents. For the reasons given, the motion to strike out the testimony of McIntyre was properly overruled.

It is further urged that the verdict of the jury was and is contrary to the law and the evidence. We have stated the substance of the evidence for the prosecution.

The defendant was a witness in his own behalf, and testified, in substance, that on the night of December 4th he worked from 9:30 to 11 o'clock P. M. He was at work for one Clarion putting shelving in a milliner's shop, and that he was not at the house on Eighth and Olive streets that night; that he went directly home on leaving Lernert's place.

William Lernert and Annie Clarion both testified that defendant worked for them in the milliner shop on December 4th until 11 or about 11 o'clock at night. On cross-examination defendant accounted for his possession of the stolen property by saying that he was a junk dealer, and that on the morning of December 5th he started out as usual and found the goods in question in a gunnysack, standing against a tree at Ninth and Olive streets, and that he put them in the barn because he "was afraid Minna Cota [a woman with whom defendant seems to have lived] would take them."

Upon the testimony, the foregoing of which is the substance, the jury was the sole judge as to the guilt or innocence of defendant. Having found him guilty, we do not feel called upon to disturb the verdict. The jurors may have disbelieved the testimony tending to prove an *alibi*, or, what is more probable, may have believed either that defendant's witnesses were mistaken as to the hour at which defendant ceased work, or that the witnesses for the prosecution were mistaken in supposing the burglary was committed earlier than 11 o'clock.

The fourth and last assignment of error is based upon the alleged misconduct of the deputy district attorney, who prosecuted the cause, in asking questions in cross-examination of the defendant, which were incompetent, etc., for the purpose of preju-

dicing appellant in the minds of the jury, as to which questions the said deputy knew an objection would be sustained.

The defendant had testified, as before stated, that he found the goods in an alley, etc. The deputy district attorney then asked him as to his finding other things, a trunk included, in the same vicinity; whether he took it home; whether Minna Cota helped him take it in; whether she was his wife; why he did not tell on his primary examination that he worked for Lernert that night.

Objections were sustained to all of these questions when such objections were interposed, and, when answered without objection, the answers were promptly stricken out by the court and the jury instructed to disregard such testimony.

We fail to see any injury to defendant by those questions; some of them were proper on cross-examination; others of them, while improper, were of little moment. (*People v. Kamaunu*, 110 Cal. 609.)

The only other questions grouped by the appellant with the foregoing, and apparently (although not specifically) constituting the head and front of the prosecutor's offense, were the following proposed to defendant: "Have you ever been convicted of a felony? A. Yes, sir, I have—yesterday." "What was the charge? A. Burglary." This seems to have been stricken out.

At least, counsel for defendant had the answer to a succeeding question stricken out, and asked the court "to instruct the jury to disregard any evidence as to any other case." The court thereupon told the jury to "disregard the testimony in regard to any other case, if any has gone in." These last questions were proper to be put to the defendant on cross-examination.

Upon the trial of a defendant it is not proper to show him to have been guilty of some other offense for the purpose of raising a presumption, either of law or fact, of his guilt in the case under consideration. But when a defendant offers himself as a witness in his own behalf he becomes subject to most of the rules applicable to other witnesses, and among those, and for the purpose of impeaching his evidence, he may be asked if "he has been convicted of a felony," or the fact, if it exist, may be shown by the record of the judgment. (Code Civ. Proc., sec. 2051; *People v. Chin Mook Sow*, 51 Cal. 600; *People v. Amanacus*, 50 Cal. 233.) Prior to the adoption of the code such proof could only be made

by the record. (*People v. McDonald*, 39 Cal. 697; *People v. Reinhart*, 39 Cal. 449.)

Upon the record we recommend that the judgment and order appealed from be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 76. In Bank.—December 14, 1897.]

SAN FRANCISCO BRIDGE COMPANY, Respondent, v.
DUMBARTON LAND AND IMPROVEMENT COM-
PANY, Appellant.

ASSUMPSIT—QUANTUM MERUIT—INSUFFICIENT DEFENSE—SPECIAL CONTRACT FOR CONSTRUCTION OF LEVEE—NONPERFORMANCE—NONPAYMENT OF INSTALLMENTS.—The failure to make agreed monthly payments, under a special contract for the construction of a levee, is a substantial breach thereof by the one for whom it is constructed, and justifies the contractor in refusing to proceed further thereunder; and he may thereupon maintain an action of *assumpsit* upon a *quantum meruit* to recover the value of the work and labor done; and plaintiff's nonperformance of the special contract cannot be maintained as a defense to the action, it appearing that the defendant was first in default.

ID.—CONTINUANCE OF WORK AFTER DEFAULT—RELIANCE UPON PROMISES.—The fact that the plaintiff continued work under the contract after the default of the defendant does not affect the right of the plaintiff to cease work upon continued nonpayment; but plaintiff had the right to rely for a reasonable time upon the promises of defendant to pay.

ID.—DETERMINATION OF AMOUNT DUE UNDER CONTRACT.—Where there appears to have been no difficulty in determining the amount due under the contract, the fact that the contract did not expressly provide a specific method of determining the amount due at the end of each month for the work already performed is immaterial.

ID.—EVIDENCE—IMPORTANCE OF COMPLETION OF CONTRACT IN TIME LIMITED—PRESENT BENEFIT TO DEFENDANT OF WORK DONE.—The defendant, having first broken the contract by nonpayment of the installments due thereunder, cannot insist that plaintiff should go on and complete the contract within the time specified; and there is no material error in excluding evidence to the point that plain-

tiff was informed that it was important to construct the levee within the time specified in the contract, nor in excluding evidence on the question whether or not the work done on the levee is of any present benefit to the defendant, and whether the defendant has sustained any loss from the fact that it was not completed within the time specified.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

John H. Durst, and Louis F. Dunand, for Appellant.

R. Percy Wright, and T. C. Coogan, for Respondent.

McFARLAND, J.—This is an appeal by the defendant from a money judgment in favor of plaintiff, and from an order denying a new trial. Each party is a corporation.

The action is brought to recover upon a *quantum meruit* for certain work done by the plaintiff upon a levee on the land of defendant, and for certain materials furnished by plaintiff and used in said levee. It was averred that said work and materials were reasonably worth the sum of \$15,000; that defendant has paid thereon \$2,000, and no more; and that there is due the sum of \$13,000, for which judgment is prayed. At the trial there was a stipulation as to what the actual value of the said work and materials was, and in accordance with said stipulation it was found to be \$9,983; and, deducting the \$2,000 paid, judgment was rendered for plaintiff for \$7,983. This finding was amply sustained by the evidence; and the judgment was correct, unless a certain special defense set up by defendant can be maintained.

The answer sets up as a special defense that the said work was done by plaintiff under a special written contract entered into by the parties on the twenty-second day of April, 1892, by which it was covenanted by the plaintiff that, "in consideration of the promise of said party of the second part hereinafter set forth," it would build and construct for the defendant a certain levee, in front of certain lands of the defendant, the levee to be constructed of a certain size, and in a certain manner, and to be about 28,000 feet long. In consideration of the covenants of the plaintiff, the defendant agreed to pay it the sum of \$21,500, "fifty

(50) per cent of said sum to be paid in monthly payments as the work progresses, in amounts proportioned to the amount of work and labor done and material furnished and used about said work at the time such payments are made," the balance to be paid after the work should be complete. The work was to be done "between the first day of May, 1892, and the thirtieth day of October, 1892." The plaintiff commenced the construction of the levee on the tenth day of May, 1892, and proceeded to construct the same in accordance with the provisions and requirements of said contract. On the tenth day of June, when the first monthly payment was due, the defendant failed to make said payment or any part thereof. It also failed to make a payment on the tenth day of July; but on the fourth day of August, 1892, the defendant paid the plaintiff \$2,000, being the amount of the two payments which were delinquent on the 10th of June and on the 10th of July. But no payment was made on the 10th of August, nor was any other payment thereafter made at all by the defendant, although it was urged frequently by plaintiff to pay said unpaid monthly installments, and defendant continuously promised to pay the same. Defendant employed an engineer to examine the work, and to report the amount done, and he, on October 17th, made his report, showing the amount of work done and the amount due on the monthly installments; but it appeared, from the fruitless efforts of the plaintiff to have said payments made, that defendant could not or would not pay the same, and thereupon the plaintiff notified the defendant that unless the overdue installments were paid the work would be abandoned, and that if payment was not made before October 30th, which was Sunday, operations would be suspended. The defendant still refusing and neglecting to make any such payments, the respondent, on October 31st, elected to treat the contract as at an end, quit work, and refused to proceed any further with it. Thereupon this action was brought to recover for the value of the work already done.

The failure to make the monthly payments was a substantial breach of the contract by defendant, and justified the plaintiff in refusing to proceed further thereunder; and the defense set up by the defendant of a special contract cannot be maintained. The

case is clearly within the doctrine of *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, and *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500. We see nothing in the present case that takes it out of the rule announced in those two cases; and, therefore, it is unnecessary to notice the numerous cases to the same point cited by respondent from other states. The defendant cannot defeat the claim of the plaintiff to recover the reasonable worth of his work upon the ground that the levee was not completed within the time mentioned in the contract; because the defendant itself was first in default. It cannot defeat the plaintiff, as was said in the note to *Cutter v. Powell*, 6 Term Rep. 320, 2 Smith's Lead. Cas. 46, "by setting up a contract which he himself has broken by not paying at the appointed time. The nature of the action and the legal ground of recovery, therefore, are precisely the same as where there has been in fact no special contract at all." The defendant, having failed to comply with the condition of payment on its part, cannot insist that the respondent should proceed and complete the contract within the time specified. As was said in *Tyson v. Doe*, 15 Vt. 571: "To allow the defendant to insist on that stipulation, whilst he repudiates others, would be to enforce a different contract from that which the parties enter into." Neither are the rights of plaintiff affected by the fact that it did not stop work immediately after the failure of defendant to make the first payment. It had a right to rely for a reasonable length of time, at least, upon the promises of the defendant to pay. It was said by the supreme court of the United States in *Canal Co. v. Gordon*, 6 Wall. 569, that although the plaintiffs in that case "adhered to the contract, and pursued the work longer than they were bound to do, when they retired they were fully justified and had a clear equity to be paid a fair compensation for the work they had performed." We see nothing in the point that the contract did not expressly provide a specific method of determining the amount due at the end of each month for the work already performed. There seems to have been no difficulty in determining the amount that was due for the first two months; and defendant's own engineer in October reported the amount then due, so that there was no question on that point.

We do not see any material error committed by the court in sustaining objections to certain evidence offered by the defend-

ant. The first four questions noticed in appellant's brief, asked of the witness Rohrbacher, were all to the point whether or not the witness had informed the president of the plaintiff that it was important that the levee should be built within the time specified in the contract; and we do not see how an answer to the questions would have added anything to the terms of the contract itself. The other questions concerned the point whether or not the work done on the levee "is" of any present benefit to the defendant, and whether it has sustained any loss from the fact that the levee was not completed within the time specified in the contract; but the action is to recover the value—the extent of which in money is stipulated in the record—of the work and labor performed by plaintiff at the instance and request of defendant, and, as we have before seen, the defendant having first broken the contract by not performing the covenants, cannot, under the circumstances of this case, insist upon detriment caused by the failure of plaintiff to do something which was to be done only upon condition that defendant performed its part of the contract. We see no further points necessary to be specially noticed.

The judgment and order appealed from are affirmed.

Harrison, J., Van Fleet, J., and Garoutte, J., concurred.

TEMPLE, J., dissenting.—I dissent. Defendant appeals from the judgment and from an order refusing a new trial. The action was to recover for labor and materials done and furnished at defendant's request.

The answer sets up a special contract under which it is charged that the work was done and materials furnished. Also that plaintiff has not performed said contract. The answer also denies that defendant is in default, and claims damages from plaintiff for its alleged violation of the contract.

In the written contract plaintiff agreed that it would, between the first day of May, 1892, and the thirtieth day of October, 1892, "construct, erect, and build for the said party of the second part . . . a levee with the necessary dams and culverts . . . a total distance of about twenty-eight thousand (28,000) feet," etc.

The defendant agreed, in consideration of the premises, "that if the said party of the first part shall keep and perform all the covenants herein written to be kept and performed by it, it will

pay to said party of the first part, as and for full compensation for all the work herein agreed to be done by it, the sum of twenty-one thousand and five hundred (\$21,500) dollars in gold coin of the United States, fifty (50) per cent of said sum to be paid in monthly payments as the work progresses, in amounts proportionate to the amount of work and labor done and materials furnished and used about the work at the time such payments are made," etc.

There was no provision for ascertaining the amount of work which was done or materials furnished at any particular time when progress payments should be due. There was no engineer or method provided for making estimates.

The findings were for the plaintiff on every point. In its motion for a new trial the defendant specifically claimed and pointed out every finding of fact as unsustained by the evidence, and also claimed that every conclusion of law was erroneous. Several rulings rejecting evidence offered by the defendant are also excepted to.

It appears that one John Hackett was interested with plaintiff in the contract, and all the work done on the part of the plaintiff in performance of the contract was done by him. He commenced the work on the tenth day of May, using one dredger.

From and after the middle of June the plaintiffs were claiming that defendant should make the monthly payments, and, when so urged, the defendant objected that they did not know the amount of work done. Captain McMullen testified: "They said they didn't know how much had been done, and we told them they had better find out how much had been done."

Plaintiff never did furnish a statement of the amount of work which had been done, or of the amount which it claimed was due. Finally, on the fourth day of August, defendant paid \$2,000, which was accepted by plaintiff. The payment of this money, and its acceptance, would estop both parties from denying that the contract was then in full force and binding in all its terms upon each.

Captain McMullen, president of plaintiff, testified that he made several demands in September for further payments, and that as an excuse they sometimes said "that they didn't know how much was done; that they hadn't had a report of it, and I

insisted that they get a report of it." This witness also admitted that when they pressed hardest for money, Mr. Rohrbacher insisted that they were behind time.

Captain Hackett testified that his company was jointly interested in the work with plaintiff and that his dredger did the work and he looked after the business. After testifying for plaintiff that there were no complaints about delay, he was asked if there was any request to put on another dredger; he said: "Mr Boske and I had a talk about it; we talked several times about it; we had an idle dredger we could have put on there. By 'we' I mean our company."

"Q. State what was said. A. Well, we had a general talk on several occasions, and I said: 'If these people would show a disposition to pay us as we went along, we would put on another dredger,' but I wanted to take the one we had working there off long before we did. Q. Why? A. Well, we didn't get our money." Again he was asked by plaintiff: "Q. If the money had been paid, would there have been any difficulty in completing the contract? A. Not the slightest. If they had shown a disposition to pay that money we would have completed the work within the time easily; no trouble at all."

Captain McMullen admitted that they did not feel bound to do the work within the time stipulated. He also said that defendant never declined to pay, but simply could not get the money.

The question in the case is, Can the plaintiff recover upon a *quantum meruit*? This depends, I think, upon the question as to whether plaintiff could rightfully rescind the contract.

We have seen that plaintiff was repeatedly demanding the progress payments; that defendant was complaining that the work was not being prosecuted as it should be, that defendant did not pay, and that plaintiff, giving nonpayment as an excuse, willfully neglected to so prosecute the work that it could have been completed at the stipulated time.

Plaintiff furnished no statement of the amount of work done, although it is admitted that one was demanded. The contract did not allow defendant to furnish a superintendent, and it did furnish no one. Boske, who lived on the land, merely examined to see if the work followed the line of the survey. He was not

an engineer, and is not shown to have had the capacity to make the estimates. It was the duty of plaintiff to furnish such estimates and to make known what it claimed to be due, otherwise the defendant could never know whether payments made were sufficient. The facts upon which the liability of the defendant rested were peculiarly within the knowledge of plaintiff. (5 Am. & Eng. Ency. of Law, 528; *Chapin v. Norton*, 6 McLean, 500.)

As these statements, though demanded, were never furnished, I think defendant was certainly not in default prior to the 17th of October, when a statement was furnished by an engineer employed by itself, to which plaintiff agreed. But if it be held otherwise, it would make no difference; conceding, for the argument, that defendant was in default as to payments, and that its failure to pay was such a breach of the contract as would have justified plaintiff in rescinding, still it did not rescind. The rule is, that this right must be exercised promptly. Of course, if not so exercised by the party entitled to rescind, the contract remains binding in all its provisions upon both parties. The party entitled to rescind cannot go on performing after the breach and reserve his right to rescind if, in the light of subsequent events, he deems it will then be for his interest to rescind. Both must be bound, or neither will be.

Now, it is practically admitted, both by McMullen and Hackett, that plaintiff made no effort to comply with that part of their contract which required them to complete the work before the thirtieth day of October, and they gave as a reason that defendant did not pay the installments as they fell due. But in no view of the law were they justified in so doing. If they had a right to rescind, because of a failure to perform on the part of defendant, and did not, such failure constituted no excuse for their dilatory prosecution of the work. They should have performed the contract according to its terms, or should have stopped work. Under their construction of the contract, they could put men and machinery upon this work when otherwise they would have been idle, and then make defendant pay for it although it could reap no benefit from it.

On the 17th of October, for the first time, plaintiff made a lawful demand upon defendant for the money due on the progress

payments, and upon its failure to pay them notified it that if the money was not paid by the thirtieth of October plaintiff would abandon the work.

By the terms of the contract the work was to be completed "between the first day of May, 1892, and the thirtieth day of October, 1892." Unless, therefore, defendant was in default, there was nothing to rescind on the thirtieth day of October. The very notice itself is an admission that plaintiff had been guilty of such a breach of a contract as would prevent rescission on its part. Where a party is himself in default he cannot rescind because of a breach by the other party. (Story on Contracts, secs. 1337, 1338; 2 Parsons on Contracts, 834; 21 Am. & Eng. Ency. of Law, 77; *Piper v. Sloneker*, 2 Grant Cas. 113; *State v. McCauley*, 15 Cal. 458; *Kokomo Straw Board Co. v. Inman*, 11 N. Y. Supp. 329; 58 Hun, 603.)

If he could do this, he could thereby avoid liability for his own default and recover full compensation for work which, because of his default, may be of no value to the other party. If the other party has been guilty of a breach also, he is put to his action for damages, in which there may be recoupment because of his default. (*Hard v. Seeley*, 47 Barb. 428; *Beatty v. Harkey*, 2 Smedes & M. 563; *Born v. Schrenkeisen*, 110 N. Y. 59; *State v. McCauley*, 15 Cal. 458; Parsons on Contracts, 680; *Fountain v. Semi-Tropic L. & W. Co.*, 99 Cal. 677.) Under such circumstances, he could not recover the value of his work and labor as rendered at the request of defendant, but he could have completed the work and sued for his money with damages, leaving to defendant the right to recoup. If he abandoned the work, he could recover nothing unless defendant proceeded to make use of the levee, in which case he could recover the value of the levee and not of the work at contract rates.

Defendant offered to show that it had made no use of the levee and that it was worthless. The court rejected the evidence, and the ruling is assigned as error. If that evidence was material, it must be assumed on this appeal that the defendant could have made the proof.

Where a person contracts to do work by a certain time, at law time is always of the essence of the contract.

Counsel contend that there never was a breach of the con-

tract because the defendant was always in default and could not have complained of nonperformance on the part of plaintiff. I see no reason why the rule would not work both ways, but there is nothing in the suggestion. The case most relied upon on this point is *Smith v. Corn*, 3 Misc. Rep. 545; 23 N. Y. Supp. 326. It was upon a building contract to recover for an installment which accrued in the progress of the work. The contract itself provided a remedy in case the work was not prosecuted diligently. The owner could step in and do the work himself, and charge the contractor with the cost. The owner did not avail himself of the privilege given him by the terms of the contract, but permitted the contractor to go on with the work and refused to pay the installment. The court held that defendant could not permit the plaintiff to go on with the work and then refuse to pay, and being himself in default he could not rescind. The contractor was permitted to sue for the installments, with the privilege on the part of the defendant to recoup. The plaintiff in a supplemental complaint alleged prevention. The case is on no point an authority for this plaintiff.

The court said: "Defendants had suffered the plaintiffs to go on and complete the work which entitled them to the payment, and it then became due and payable, subject only to deductions for losses sustained by delay. Under the contract the defendants might have given notice to plaintiffs and proceeded to complete the work themselves, but they did not avail themselves of this privilege, but treated the contract as still in force and suffered the plaintiffs to go on, and their claim is limited to damages for not performing the work for such installment within a reasonable time." So here the plaintiff cannot avoid the defendant's claim for damages for its default. The fact that defendant had been guilty of a breach of the contract would not prevent it from recovering damages for plaintiff's breach.

The court further said, as stated in respondent's brief, that plaintiff was not bound to go on with the work after defendant refused to pay the installments. So here, perhaps, before plaintiff had made default it could have refused to go on, but if it did go on it elected to continue the contract in force and was bound itself by all its terms.

That case is not authority for this proposition, however, for

there the remedy of defendant for such a breach was specially provided for in the contract. If the defendant did not avail himself of that remedy he waived performance.

Graf v. Cunningham, 109 N. Y. 371, is an authority against plaintiff. It holds that Graf could not rescind for the breach of defendant because she was herself in the wrong. *Strack v. Hurd*, 62 Hun, 618, 28 Abb. N. C. 142, 16 N. Y. Supp. 566, simply holds that the plaintiff not being at fault could rescind because the defendant declined to perform.

It is suggested that the refusal on the part of defendant to pay the installments was a refusal on its part to go on with the contract, which justified plaintiff in holding that defendant had abandoned it. The line of cases which are sometimes relied upon as holding a doctrine similar to this are discussed by Judge Ross in *Cox v. McLaughlin*, 52 Cal. 590. It obtains only where, by refusing to pay, a party indicates a determination to proceed no further with the contract.

Captain McMullen testified that the defendant never showed a disposition to refuse to go on with the contract, but did not have the money and put them off with promises.

It is contended that plaintiff was in no default because his time had not wholly elapsed. He elected to rescind on the last day, and it was not open to defendant to assume a future default, or even to show that performance had become impossible. This position is untenable for two reasons: 1. Plaintiff did not have the thirtieth day of October on which to complete performance. The contract was to have been wholly performed before that day—between the 1st of May and the 30th of October. 2. Plaintiff was shown to have been in default because it had become wholly impossible for it to perform. It had rendered it impossible by its willful neglect; but it would have made no difference if it had become impossible without its default. It not only agreed that it would perform within the time but that it could. Defendant offered to prove that performance had become absolutely impossible long before the 17th of October, when the first valid demand was made. The court refused to receive the evidence, and this ruling is before us for review.

The following authorities abundantly establish that the court erred in refusing to receive the evidence, and also that plaintiff

was guilty of a breach in this respect: Bishop on Contracts, secs. 826, 1426, 1440; Wharton on Contracts, sec. 312; 3 Addison on Contracts, 830; *Bloomer v. Bernstein*, L. R. 9 Com. P. 588; *Poirier v. Gravel*, 88 Cal. 79; *Wolf v. Marsh*, 54 Cal. 228; *Lovell v. St. Louis etc. Ins. Co.*, 111 U. S. 264; 2 Wharton on Contracts, secs. 309, 885, and note.

It is said that defendant has not pleaded the waiver on the part of plaintiff. It was not necessary that it should—admitting that it is ever necessary. Waiver is no part of the defendant's case. The question is as to the right of the plaintiff to rescind, or to refuse to go on because the defendant has abandoned its contract.

I think that the judgment and order should be reversed, and a new trial ordered.

Henshaw, J., and Beatty, C. J., concurred in the dissenting opinion.

Rehearing denied.

[Sac. 288. In Bank.—December 15, 1897.]

O. J. WOODWARD, Respondent, v. JOHN BROWN et al., Appellants.

FORECLOSURE OF MORTGAGE—CONDITIONAL LIABILITY OF MORTGAGOR—

RELEASE OF PART OF SECURITY FOR LESS THAN VALUE—DEFICIENCY.

The mortgaged premises constitute the primary fund out of which the mortgage debt must be paid, and the liability of the mortgagor is contingent on a sale of the mortgaged premises under foreclosure and an application of the proceeds to the debt and costs, and the deficiency which the code directs may take the form of a personal judgment is a deficiency arising from the sale of all the mortgaged premises, and not a part of it; and if the mortgagee arbitrarily releases portions of the mortgaged premises for less than their actual value, without the consent of the mortgagor, he cannot, on foreclosure, hold the mortgagor liable to a judgment for the apparent deficiency, but must credit the mortgagor with the actual value of the portions released, and if there would have been no deficiency, if the mortgagee had not released any part of his security, he cannot hold the mortgagor for any deficiency.

ID.—DEED BY MORTGAGOR — PERSONAL COVENANT AGAINST ENCUMBRANCES—RELEASE TO GRANTEE.—A covenant against encumbrances, expressed or implied, in a bargain and sale deed by the mortgagor, is a personal covenant, and is not appurtenant to the

land nor available to the mortgagee; and a release given to such grantee by the mortgagee, without the consent of the mortgagor, for less than the value of the land released, cannot affect the right of the mortgagor to have the value of such land applied upon the mortgage debt, as respects a deficiency judgment.

ID.—DECREE OF FORECLOSURE—SALE OF MORTGAGED LOTS IN INVERSE ORDER OF ALIENATION.—Where portions of the mortgaged premises have been alienated by the mortgagor, the decree of foreclosure must order a sale of the premises, subject to the mortgage, in the inverse order of their alienation.

ID.—EFFECT OF PARTIAL RELEASES BY MORTGAGEE—RIGHTS OF PURCHASERS OF LOTS NOT RELEASED—NOTICE TO MORTGAGEE.—The record of conveyances by the mortgagor to purchasers of lots from him, which are not released from the mortgage security, is not constructive notice to the prior mortgagee of such conveyances or of any subsequent conveyances by them to other grantees, and if he has no actual knowledge thereof, he is not prevented thereby from dealing in any manner with the mortgaged premises, and he may release other lots from the mortgage without liability to such purchasers or their grantees, or any impairment of his remaining security upon the mortgaged premises; and the most that can be claimed by them is that the sale should proceed in the proper order of alienation of lots remaining subject to the mortgage.

ID.—POWER OF PARTIAL RELEASE—REGISTRY—NOTICE.—A mortgagee has power to give partial releases from the operation of the mortgage of portions of the mortgaged premises, without, in any manner, affecting or discharging his security upon the remainder of the premises; and the registry of such partial releases is sufficient to impart notice to any person dealing with the property, whether noted upon the margin of the record of the mortgage or embodied in separate instruments duly acknowledged and recorded.

ID.—CONSTRUCTION OF PARTIAL RELEASE—LIMITATION OF GENERAL WORDS OF SATISFACTION.—A partial release of particular lots from the operation of a mortgage of a larger tract, for a small consideration expressed in the release, will not be construed to operate as an entire satisfaction of the mortgage debt, on account of the use of general words of satisfaction therein, but such words will be construed as limited and not to be extended in effect beyond the evident intention of the mortgagee; nor can purchasers of mortgage lots who took prior to such release be misled by its terms.

ID.—AGREEMENT FOR RELEASE FROM MORTGAGEE—PRIOR ASSIGNMENT OF MORTGAGE—REGISTRY — NOTICE OF ASSIGNMENT. — An agreement made with the mortgagee that he would release lots previously sold from the operation of the mortgage, and would hold the purchaser harmless and secure in the title to the lots, made long after the purchase and deed of the lots, and still longer after the assignment of the mortgage to the plaintiff, cannot bind the plaintiff without proof of his knowledge and consent thereto; and the registry of the assignment of the mortgage is part of the record title of which a purchaser from the mortgagor must take notice.

ID.—CONFLICTING DEEDS—RELEASE FROM MORTGAGE—KNOWLEDGE OF MORTGAGOR—PRIORITY OF DELIVERY—BURDEN OF PROOF—PRESUMPTIONS—CREDIT OF VALUE OF LOTS RELEASED.—Where a grantee of the mortgagor executed two deeds of the same date to different grantees, one of which conveyed two lots to one grantee, and the other conveyed the same lots and the residue of the mortgaged property to the other grantee, and the mortgagee, with knowledge of both grants, released the two lots to the special grantee thereof, whose deed was first recorded, and his prior right to the lots was recognized in the decree of foreclosure of the mortgage, the burden of proof is on the defendants claiming under the other deed to prove its prior delivery, and, in the absence of such proof, it is to be presumed in support of the judgment that the deed first recorded was first delivered; but this presumption does not apply as respects the additional mortgaged property included in the other deed, which must be held to have taken effect as to that property of its date, and prior in time to the special deed of the two lots, which could not be released as against the owners of the other lots, without crediting their full value upon the mortgage debt.

ID.—APPORTIONMENT OF VALUE OF LOTS RELEASED.—The value of the lots released cannot be apportioned so as to be credited wholly to a portion of the other lots included in the mortgage which belong to the defendants appealing, but the nonappealing defendants owning the residue of such lots must share in the benefits of the credit.

ID.—INVERSE ORDER OF ALIENATION—SHERIFF'S DEED—RELATION TO LIEN OF ATTACHMENT.—In determining the inverse order of alienation of mortgaged lots sold by the mortgagor, a sheriff's deed must be deemed to relate to the lien of an attachment upon the lots sold; and it is error to order such lots sold under the decree of foreclosure prior to lots conveyed intermediate the attachment and the sheriff's deed.

ID.—LOT CONVEYED TO PERSON NOT A PARTY.—It is error to order a mortgaged lot to be sold under the decree of foreclosure, which prior to the commencement of the action had been sold and conveyed to a person not a party to the suit, unless it is made to appear that prior thereto such person had sold it to a person who was made a defendant.

ID.—IMPROPER ORDER OF SALES — LANDS OF PARTY NOT APPEALING — RIGHTS OF APPELLANTS.—A party not appealing cannot complain of the order in which the sale of mortgaged lots is to be made; but the sale of the lands of such party which remain subject to the mortgage must, with reference to other defendants appealing, be made with a due regard for their equities.

ID.—RIGHT OF PLAINTIFF TO SUE—FINDING—EVIDENCE—ASSIGNMENTS—RECITALS.—A finding that plaintiff was the owner and holder of the notes and mortgage when the action was brought substantially finds on the issue raised by the answer that plaintiff was not the real party in interest and had no right to prosecute the action, and the finding is sufficiently sustained by evidence of an assign-

ment made to plaintiff, though he was at the time acting for a bank of which he was president, and testimony by him that he finally bought them outright; and his title as owner and holder cannot be defeated by recitals in a subsequent assignment from the assignor to another assignee to the effect that the notes and mortgage were held by plaintiff and the bank as security for indebtedness to them.

ID.—RIGHT OF COLLECTION—IMMATERIAL EVIDENCE—AMOUNT PAID FOR ASSIGNMENT—TIME OF ACQUISITION OF TITLE.—For the purpose of bringing the action, it would be sufficient if plaintiff held an assignment of the notes and mortgage merely for collection, and questions put to him as to the amount paid by him for the mortgage, and whether there was anything owing to the bank of which he had been president, of which he testified that he bought the mortgage, and as to when he acquired the absolute title, were properly disallowed as immaterial.

ID.—NOTES PAYABLE AT DIFFERENT TIMES—OPTION AS TO MATURITY—BRINGING OF ACTION—APPLICATION OF PAYMENTS — IMMATERIAL APPLICATION TO LAST NOTE.—The bringing of an action upon a note not mature upon its face operates as an exercise of an option given in the note to regard it as due for nonpayment of interest thereon; and where three notes were given, payable at different times, and the first was paid in full at maturity, and the second was past due when suit was brought thereon, and the last was payable *in futuro*, but subject to the option to regard it as due for nonpayment of interest, and each bore the same rate of interest, the fact that some of the payments received by the plaintiff were applied upon the third note instead of the second is immaterial, it appearing that, if all the payments made after payment of the first note had been indorsed upon the second note, there would still be an unpaid balance on the second note and unpaid interest on both notes when the action was brought.

ID.—ALLOWANCE OF ATTORNEY'S FEES.—Where the mortgage provides for a reasonable counsel fee to be fixed by the court in case of foreclosure, the duty of fixing the amount of compensation is cast upon the court, and no evidence of value of the services is necessary.

ID. — MOTION FOR NEW TRIAL — EXPURGATED AFFIDAVIT — HARMLESS RULING.—An order striking out an affidavit on motion for new trial is harmless where the matters contained in it were mainly recitals of what appeared in the record, and it was not in support of the ground of newly-discovered evidence, and was more in the nature of an argument on the motion than the presentation of any new fact of which the court could take notice.

ID.—SUMMONS—AFFIDAVIT OF PUBLICATION—RETURN OF SHERIFF NOT REQUIRED.—Where the complaint states a good cause of action, an affidavit for the publication of summons which gives the names of the defendants, and states that they reside out of the state, names the state in which each resides, and refers to the verified complaint and makes it a part of the affidavit, and states that the defendants are proper and necessary parties to the action, and that affi-

ant has a good cause of action against the defendants, as he is advised by his counsel and verily believes, is not defective, and need not state that the sheriff had returned the summons, and it is not material whether the summons had been returned when the affidavit was made.

ID.—PROOF OF PUBLICATION—AFFIDAVIT OF PUBLISHER AND PROPRIETOR.

An affidavit proving publication of the summons may be sworn to by the publisher and proprietor of the paper in which it was published, such "proprietor" being in the sense of the statute synonymous with "printer"; and where such affidavit states that the summons was published weekly in a paper named, which was a daily and weekly newspaper, in each and every one of the consecutive weekly issues of said newspaper, and the time of publication stated covered twenty weekly insertions, and a period of seventy days, the affidavit shows a sufficient length of publication, and that the publication was once a week.

ID.—AFFIDAVIT OF SERVICE—EX PARTE AMENDMENT NUNC PRO TUNC.—

An affidavit of the personal service of summons may be amended by leave of the court after judgment, to supply *nunc pro tunc* the statement omitted by inadvertence that affiant was over the age of eighteen years when he made the affidavit; and though the practice of allowing such an amendment to be made without notice is not to be commended, yet where it was allowed *ex parte*, and the defendants had subsequent notice and full opportunity to take steps to have the truth of the matter ascertained, and did not ask to have the order vacated for any reason, or controverted any fact stated therein, the *ex parte* order allowing the amendment, and directing that the amended affidavit be made part of the judgment roll, will not be disturbed upon appeal.

ID.—AMENDMENT OF COMPLAINT AFTER PUBLICATION OF SUMMONS—MATTER NOT OF SUBSTANCE.—

An amendment of the complaint in matter of form after the publication of summons, merely setting out the indorsements of payments on the notes, in the nature of a bill of particulars from which it could be ascertained what appeared in the complaint, does not come within the rules that an amendment in matter of substance after default opens up the default, and such amendment does not require republication of the summons nor service upon absent defendants.

APPEAL from a judgment of the Superior Court of Madera County and from an order denying a new trial. W. M. Conley, Judge.

The facts are stated in the opinion.

Robert L. Hargrove, for Appellants.

George E. Church, and George B. Graham, for Respondent.

THE COURT.—A petition for hearing in Bank having been granted, upon further consideration it appears that on January 20, 1892, McDonald conveyed to John Brown Colony, a corporation, and to D. S. Dorn blocks 51 and 60. On that day the title still remained in Brown. The Dorn deed was recorded January 23d, while the John Brown Colony deed was recorded January 26th. On January 25, 1892, Brown conveyed these same blocks to McDonald, the title thus inuring to Dorn, who first recorded his deed. The presumption of law relating to blocks 51 and 60 was correctly applied in holding in the former opinion that the Dorn deed was first delivered. But it does not apply to the John Brown Colony deed as respects the other blocks and lots conveyed to that corporation. As to them, that deed must take date of January 20th, and therefore prior to the Dorn deed, and the Dorn block could not be released without crediting their full value upon the mortgage debt, as the mortgagee had actual knowledge of the John Brown Colony deed. The value of these blocks was found to be \$8,000. The mortgagee did in fact credit the mortgage debt with \$5,000 on account of the sale to Dorn, so that there remains to be credited the further sum of \$3,000, which should be done as of the date of the release of the Dorn blocks, March 1, 1892. We see no way to apportion this amount so as to exonerate the lots owned by the appealing defendants alone in the ratio that their lots bear to whole number of lots sold by John Brown Colony; nor do we see any way by which any principle of apportionment could be applied upon any basis of values. As the case stands, it is the fortune of the nonappealing defendants to share the benefits of this credit, as it would have been their misfortune had the dates of the conveyances to John Brown Colony and to Dorn been different.

In the matter of the petition by plaintiff for a modification of the opinion directing that Cecil Ricketts be made a party defendant, the petition will be granted in so far that should it appear that Ricketts had sold his lot prior to the commencement of the action to a person who was made a defendant, the direction heretofore given may be disregarded.

Wherefore, it is ordered and adjudged by this court in Bank that the judgment heretofore rendered in Department be modi-

fied in the foregoing particulars, and that the judgment as modified stand approved.

BEATTY, C. J., concurring.—I concur in the judgment and in the opinion of Commissioner Chipman, as modified, upon all points but one. I dissent from the order striking out the deficiency judgment against Brown and from the reasoning upon which it is based. I agree to the general proposition that the mortgagee cannot release the mortgage in whole or in part without the consent of the mortgagor, and upon a full release hold the mortgagor to a personal liability, or upon a partial release claim a deficiency judgment greater than would have resulted if no part of the mortgaged property had been released. But when a mortgagor conveys the whole or a part of the mortgaged premises to a third party by a deed containing an express or implied warranty that the premises are free from encumbrances created or suffered by him, and the mortgagee releases to the grantee of the mortgagor, I think the consent of the mortgagor to the release should not only be presumed, but he should not be heard to allege that the release was without his consent.

The moment he makes such a conveyance his covenant is broken and he becomes bound to his grantee to have the mortgage released. If the mortgagee will consent to the release, he cannot refuse to do what he is under a legal and moral obligation to do. Suppose, in such a case, the mortgagee should offer to release upon condition that the mortgagor would give his written consent, and the mortgagor should refuse, would not a court of equity compel him to consent? And if he would be compelled to consent where the mortgagee made that the condition of release, why should he be allowed to say he did not consent when the mortgagee has released without conditions? In the eyes of equity what ought to be done is done.

And how, upon this theory of the law, is the mortgagor injured? His grant, bargain, and sale deed implies that he has been paid or secured the full unencumbered value of the land he has sold, and, if there results from the release a larger deficiency judgment against him, he has the money derived from the land itself to pay the difference.

Henshaw, J., concurred.

The following is the opinion above referred to rendered in Department Two, November 1, 1897:

CHIPMAN, C.—This is an action to foreclose a certain mortgage executed by John Brown, one of the defendants, to Thomas E. Hughes, another defendant, on September 28, 1889, to secure certain three promissory notes of even date with the mortgage, executed by Brown to Hughes, which said notes and mortgage were, on May 1, 1891, before maturity, assigned to plaintiff. The property mortgaged consisted of certain lots and blocks of Hughes' addition to the town of Madera, situated at the time in Fresno county, now Madera county, about one thousand lots in all, many of which afterward fell into the ownership of divers persons who were made defendants as claiming some interest therein. Default was entered as to certain seventeen of the defendants, and certain five of the defendants, viz., Bank of Madera, Annie Lazar, John Brown, A. J. Etter, and N. Rosenthal, appeal. The pleadings cover five hundred folios, and present an exceedingly complicated array of facts out of which the issues arise.

It appears that mortgagor Brown conveyed block 65 March 17, 1891, before the assignment to plaintiff, and mortgagee Hughes released the same to Brown, consideration for sale being \$3,000, and for the release \$1,000. Brown also conveyed the east half of block 59 September 4, 1891, and the west half of block 59 October 8, 1891. This block was released by plaintiff September 4, 1891, consideration not shown. Brown also conveyed blocks 51 and 60 to McDonald, trustee, by deed dated January 20, 1892, and McDonald, by deed of same date, conveyed the same lots to one Dorn, consideration mentioned, \$10; released by plaintiff February 23, 1892, for consideration of \$5,000. All the remaining mortgaged premises were conveyed by Brown to McDonald, trustee, October 8, 1891, by grant deed; consideration stated was \$10. McDonald conveyed by grant deed to John Brown Colony, a corporation, January 20, 1892, the lots described in his deed of October 8, 1891, consideration mentioned, \$10. The colony corporation commenced selling lots January 21, 1892, and disposed of quite a number up to January 19, 1893, when it conveyed the remaining lots and blocks, still a large number, to the Madera Fruit and Land Company, a cor-

poration. This latter corporation sold several of the lots, when, on June 2, 1893, the remainder were attached at the suit of Bank of Madera, and it received sheriff's deed to the property of date March 12, 1895. Etter's deed is from John Brown Colony, dater February 23, 1892. Lazar's deed is from Madera Fruit and Land Company, dated May 27, 1893. Rosenthal's deed is from same company, and is dated June 3, 1893. Other facts will appear in connection with the various points raised by counsel.

As conclusions of law, the court found that plaintiff was entitled to the decree of the court for the sale of the premises not released and in the inverse order of the several conveyances thereof, and for deficiency judgment against Brown.

The decree was entered accordingly. The appeal is from the decree and from the order denying motion for new trial, and from the order made May 9, 1896, striking out the affidavit of Robert L. Hargrove, served and filed in support of said motion for new trial.

1. The first question presented is as to the rights of the mortgagor Brown. It is claimed by him that under section 726 of the Code of Civil Procedure, and the decisions of this court touching that section, the mortgaged premises constitute the primary fund out of which the mortgage debt must be paid, and that the mortgagee cannot arbitrarily release portions of that fund for less than their actual value without the consent of the mortgagor, and, if he does so, he must on foreclosure credit the mortgage with the value of the portions released. (Citing *Bartlett v. Cottle*, 63 Cal. 366; *Porter v. Muller*, 65 Cal. 512; *Bull v. Coe*, 77 Cal. 54; 11 Am. St. Rep 235; *Barbieri v. Ramelli*, 84 Cal. 154.)

Respondent treats this point as of little consequence and makes but a mere passing allusion to it. Section 726 of the Code of Civil Procedure provides: "There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action, the court may by its judgment direct a sale of the encumbered property . . . and the application of the proceeds of the sale to the payment of the costs of the

court and the expenses of the sale, and the amount due to the plaintiff; and if it appears from the sheriff's return that the proceeds are insufficient and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt," etc.

The question presented is, not whether the mortgagee may release a portion of the property and look only to the residue, or may foreclose upon a part only and waive his security as to the residue, which he may do; but it is whether he may do this without the consent of the mortgagor and have a judgment docketed for a deficiency.

We cannot perceive upon what principle of equity or by what construction of this section it can be held that the mortgagee may, without the consent of the mortgagor, let go part of his security to a purchaser from the mortgagor, at less than its value it may be, and then look to the mortgagor to make up the deficiency. It would be a gross injustice to the mortgagor to hold him liable for a deficiency which the mortgagee has, without the mortgagor's authority or consent, created. The deficiency which the code directs may take the form of a personal judgment is a deficiency arising from the sale of all the mortgaged security, and not a part of it. (*Jones on Mortgages*, sec. 678 a; *Worcester Sav. Bank v. Thayer*, 136 Mass. 459; *Townsend Sav. Bank v. Munson*, 47 Conn. 390.)

The danger to the interests and rights of the mortgagor will at once be seen by supposing a not improbable case and one much like the one before us. The mortgagee, for reasons of his own, releases one after another of the mortgaged lots without consideration therefor or for a small consideration, thinking that he has retained enough out of which to realize on sale the amount of the debt. It turns out, through depreciation of values or other cause, that he miscalculated the value of his retained security and there was a deficiency after sale. Now there would have been no deficiency if he had not released a portion of his security. It would be clearly inequitable to hold the mortgagor in such case for any deficiency.

In *Porter v. Muller*, *supra*, it was held that the proceeds of the sale of the mortgaged premises constitute the primary fund out of which the mortgaged debt must be paid. In *Biddell v.*

Brizzolara, 64 Cal. 354, it was said: "Whatever the form of the debt, the mortgagor can be legally compelled to pay no part of it until decree is entered for the sale of the premises mortgaged, and the liability which shall then accrue to him is a liability to pay only a deficiency which shall appear on the sheriff's return. The liability of the mortgagor is therefore contingent on the fact that a sale of the mortgaged premises shall satisfy the debt and costs." In *Toby v. Oregon etc. R. R. Co.*, 98 Cal. 490, the language is: "The mortgagee must exhaust the property."

In *Brown v. Willis*, 67 Cal. 235, it was held that "a mortgagor cannot be compelled to pay any part of his mortgage debt until a decree is entered for a sale of the premises mortgaged." But if the mortgagee should release a part, he places himself in a position where he cannot sell all the premises. It is well settled that no deficiency can be entered up where a partial foreclosure takes place; it can only be done upon final sale of all the property. So long as any of the mortgaged premises remains unsold there can be no deficiency. (*Bull v. Coe. supra.* See, also, *Hall v. Arnott*, 80 Cal. 348.)

In *Blumberg v. Birch*, 99 Cal. 416, 37 Am. St. Rep. 67, it was held that, after sale of the mortgaged premises and there remaining a deficiency, action would lie to recover the amount, although the deficiency judgment was void; but this was upon the assumption that the mortgage security had been exhausted by the foreclosure sale.

In *Barbieri v. Ramelli, supra*, it was held that the mortgagee "was not authorized to waive the security and bring an action on the indebtedness, and the court erred in so holding, as it did in effect, and rendering judgment for plaintiff."

It seems to us that to allow the release of part of the security and to provide for a deficiency judgment, as was done in the case before us, would be a violation of the underlying principle of the case last cited, for the mortgagee would thus get a judgment which could be enforced against the mortgagor precisely as if the mortgagee had first waived his security and brought suit on the notes. If he can release part of the security, he can release all, and thus defeat the purpose of the law, which is to confine the mortgagee to the one action and to his security as

a primary fund. If it be said that, while he cannot waive all the security and then bring an action at law, he may waive part and foreclose on the residue and have his deficiency judgment, the answer is that the law will not allow him to accomplish indirectly what he cannot do directly.

Numerous cases are cited in Jones on Mortgages, sections 722 and 981, to the effect that, as between the mortgagor and the mortgagee, the latter may release any portion of the mortgaged premises without affecting the lien upon the residue. But the cases cited by the learned author do not deal with the rights of the mortgagee to a deficiency judgment where he releases without the consent of the mortgagor, nor does it appear in those cases that the statute was as it is here. They deal with the mortgagee's right to foreclose on the unsold portion still in the hands of the mortgagor. Under our statute, on foreclosure, the land becomes the principal debtor and the mortgagor the surety, and his rights as surety should be preserved.

It may be that, in those jurisdictions where an action is given on the debt as well as on the security, the mortgagee may release regardless of the mortgagor's rights, or may proceed regardless of the security, but in this state the law gives him but one action, and he should be confined to that, at least to the extent of requiring him first to exhaust his security before obtaining other relief. If he desires to release a part of his security, and still hold the mortgagee for any deficiency after foreclosure, he must obtain the mortgagor's consent, or see to it that in releasing he is paid full value and gives the mortgagor credit therefor.

The form of deed from Brown to McDonald cannot affect the question. By it Brown's covenant was that the land was free from encumbrance, but this covenant was not such as is appurtenant to and runs with the land, under sections 1113 and 1460 of the Civil Code. It was a personal covenant. (*Lawrence v. Montgomery*, 37 Cal. 183, and cases there cited.) If the mortgage had been foreclosed upon all the property while Brown held the title, Brown would, of course, in any event, have been liable for a deficiency, and McDonald would have had his action against Brown upon the covenant. The right of the mortgagee to a deficiency judgment, however, would not arise from the

form of McDonald's deed, but from the mortgage and the statute, and from the fact that the mortgagee had not by his own act impaired his security in any manner. If he had released all of the lots but one to McDonald, without the knowledge or consent of the mortgagor, it would be unconscionable to hold that he could foreclose on the remaining lot and have his deficiency judgment against the mortgagor. The same reasoning already stated as to the effect of the releases given by the mortgagee to various subsequent purchasers from McDonald and their grantees would apply. The covenant of the mortgagor in his deed to McDonald is not available to the mortgagee, and is wholly unnecessary for his security; nor can it in any way give to the mortgagee upon foreclosure the right to a deficiency. It is unnecessary, because the mortgagee himself has a right to a deficiency judgment when his security is exhausted, and the covenant of the mortgagor in his deed would, if available to the mortgagee, give him no better remedy.

It was stipulated that the lots were of the market value of \$125 each. The plaintiff testified that it was the understanding with some of the parties; but with whom does not clearly appear, that he, plaintiff, would release for \$25 per lot; but later along, when the defendants opened their testimony, some stipulations were entered into by the respective counsel, and, among others, "it was stipulated that John Brown never consented to the release of any pieces of property from the mortgage." We think this stipulation is controlling as to the fact agreed upon by it.

The plaintiff testified that "there were three hundred and forty-seven lots released at \$25 a lot." It also appeared that he released block 49 (in which there were twenty-eight lots) to the Madera School District without any payment. A simple mathematical calculation will show that these lots were released for several thousand dollars less than their agreed market value. If they had not been released, but had been included in the foreclosure proceedings, by no reasonable probability would there be any deficiency upon foreclosure. The decree, so far as it directs a deficiency to be entered against Brown, is erroneous, and should therefore be modified.

2. The next question presented is whether the court erred in

directing the sale of the lots in the inverse order of their alienation. We do not understand from appellant's brief that the correctness of the rule is questioned in a case like the present one. There can be no doubt but that this is the rule in this state. (Civ. Code, secs. 2899, 3433. See, also, *Kent v. Williams*, 114 Cal. 537.) But, as we understand appellants' position, it is that the rule requiring sale in the inverse order of alienation was, in certain cases involved, changed by the act of the mortgagee, and this contention will next be noticed.

3. The question most discussed by appellants is as to the equities of subsequent purchasers as they are affected by the releases made by the plaintiff of certain of the mortgaged lots, which had been sold by the mortgagor after plaintiff acquired the mortgage, and were resold by the mortgagor's grantee and again and again resold by subsequent grantees. A large number of cases are cited by appellants illustrating the rights of purchasers from the mortgagor and their grantees as affected by releases made by the mortgagee. But none of them will be found to hold that the mortgagee may not release without liability to him or impairment of his remaining security, where he does so without actual knowledge of the conveyance. As his mortgage is a lien, and creates an encumbrance alike upon all parts of the land subject to it, no subsequent change in the ownership of the mortgaged premises of which he is ignorant can in any degree limit his original rights conferred by the security. The record of subsequent conveyances is not a constructive notice to the prior mortgagee, so as to prevent him from dealing in any manner with the mortgaged premises; he must have actual notice.

The cases supporting the foregoing are numerous and will be found cited in 2 Pomeroy's Equity Jurisprudence, secs. 656, 657; 3 Pomeroy's Equity Jurisprudence, secs. 1224-26; 2 Jones on Mortgages, secs. 1621-24; 1 Jones on Mortgages, secs. 722, 723. As to the rights of the mortgagor, who had conveyed all the mortgaged premises, they are in no wise affected by these releases, except as to the single question of plaintiff's right to a deficiency judgment, and this has already been disposed of. The only other defendants appealing are Etter, Rosenthal, Lazar, and Bank of Madera, and, as to them, it follows that unless

plaintiff had notice of their deeds his releases to certain other purchasers, whether given before or after defendants' deeds, afford them no ground of complaint, and the utmost that can be claimed by them is that the foreclosure sale should proceed in the proper order.

The court found that plaintiff had no notice or knowledge of defendants' deeds, and, the evidence upon that point being in conflict, this finding cannot be disturbed. It may be said that, inasmuch as Brown's deed to McDonald implied a covenant of warranty that no encumbrance rested on the premises, an equity thus attached in favor of McDonald which passed to his grantees and purchasers from or through them.

But the covenant in Brown's deed to McDonald was personal between him and Brown, and was not a covenant running with the land, and impressed it with no such equity as would pass with the land conveyed by McDonald or his grantee. McDonald, by his grant deed, covenanted against his own acts in creating encumbrances, but not against those of his grantor, the mortgagor. McDonald's grantee took the land subject to the Brown mortgage without any agreement, express or implied, that McDonald would pay the mortgage debt; nor did McDonald's deed operate as an assignment to his grantee of the right of action which McDonald had against Brown on the implied covenant. (*Lawrence v. Montgomery, supra.*)

4. Defendants make the point that there is no provision in our code for partial or other releases; that the only provision relates to a full satisfaction, and that the partial satisfactions or releases operated to discharge the mortgage lien. (Citing Civ. Code, sec. 2938.) We do not think there can be any doubt but that partial releases are authorized by this and subsequent sections. Whether so or not, the universal practice of making partial releases, and their obvious convenience and importance to all persons having any interest in the mortgaged premises would warrant us in upholding and limiting them to the purpose expressed in making them. It certainly cannot be claimed that if a partial release is unauthorized that when made it would nevertheless operate to discharge the whole mortgage lien.

The section referred to does not provide in terms for partial satisfactions on the margin of the mortgage record or otherwise,

but as the partial releases in this case were either upon the margin of the record of the mortgage or in separate instruments duly acknowledged and recorded, we think this would impart notice or be sufficient to put a person dealing with the mortgaged property upon inquiry, which, if pursued, would easily lead to the discovery of the fact.

Defendants claim that there was one particular release made by plaintiff which had the effect to completely satisfy and discharge the mortgage. It is as follows:

“O. J. Woodward, Assignee, to John Brown.

“Dated November 11, 1893.

“Consideration \$50.

“That the following land situate in county of Madera, state of California, described as follows, to wit, lots 6 and 7 in block 67 of Hughes’ addition to the town of Madera . . . hereby released from the lien of the mortgage, made by John Brown Colony to Thomas E. Hughes, and recorded, etc., . . . together with the debt thereby secured, is fully paid, satisfied and discharged.

“(Signed) O. J. WOODWARD,

“Assignee.

“Acknowledged in due form Nov. 11, 1893, and duly recorded.”

That portion of this document reading “together with the debt thereby secured, is fully paid, satisfied, and discharged,” does not appear as part of the record evidence. At folio 793 it appears as defendants’ exhibit 37 without the paragraph above quoted. In an affidavit made by one of defendants’ attorneys, sworn to March, 5, 1896, and served on plaintiff’s attorney March 7th and filed March 10, 1896, this release is set out with the paragraph above quoted contained in it, and this alleged new matter, among other things, is stated in support of the motion for a new trial. The notice of this motion was served and filed February 29, 1896, and stated, among other things, that the motion would be heard “upon affidavits hereafter to be served.” At the hearing, May 9, 1896, this affidavit was, on motion of plaintiff’s counsel, stricken from the records, to which defendants’ counsel excepted. I think it evident from the release itself, in whichever form it is to be considered, that it was not the inten-

tion of the mortgagee thereby to release the entire debt, and that it should not be extended beyond its intention. The consideration paid for the release was \$50, and this was indorsed on one of the notes the same day as follows: "Nov. 11, 1893, lots 6 and 7, block 67, \$50," and on the mortgage was indorsed the following: "Nov. 11, '93, lots 6 and 7, block 67 (release sent to Madera.)" Defendants were not misled by it, for it was not made until after they had purchased. The case of *Beal v. Stevens*, 72 Cal. 451, cited by defendants, in no wise conflicts with this view.

5. There were other matters set forth in this expurgated affidavit, and defendants claim error in striking it out as to these matters as well. It is quite lengthy, and need not be set forth in this opinion.

This affidavit is before us as part of the bill of exceptions. It was filed on March 10, 1896, and the motion for a new trial came up on May 9th following. The matters contained in it were mainly recitals of what appeared in the record, and were more in the nature of an argument on the motion than the presentation of any new fact of which the court could take notice. It was not presented by way of suggesting diminution of the record, nor was it in support of the ground of newly discovered evidence, for that was not made a ground in the motion. All the points presented in the affidavit are made in the briefs of counsel for the defendants, and do not require its aid for their full determination which is given them in this opinion. I cannot see that they were prejudiced by striking it out.

6. Defendants assign as error that the court allowed the affidavit of personal service of summons on certain defendants made September 15, 1894, to be amended and filed September 15, 1896, *nunc pro tunc*. The particular in which the amendment was made was in stating that affiant was, at the time he served the summons, over the age of eighteen years, which by inadvertence he omitted to state. The objection made was, that the court could not, after judgment entered, allow the affidavit to be amended, and that the defaults entered were unauthorized. The order was *ex parte* and directed that the amended affidavit be made part of the judgment-roll. In *Herman v. Santee*, 103 Cal. 519, 42 Am. St. Rep. 145, it was held that this might be

done, but in that case opposing counsel was present in court and had a hearing on the motion, although not previously notified. I cannot see, however, but that the reasoning in that case and the authorities cited in it would allow such an amendment *ex parte*, and without notice, although such practice is not to be commended. In such event the party claiming to be injured could afterward appear and move to set aside and vacate the order, and such a motion should be granted upon a showing that the amendment was not true in fact. Whether, however, the motion here was of such character as to require previous notice need not be determined, for defendants had subsequent notice and full opportunity to take steps to have the truth of the matter ascertained and cause the order to be vacated if erroneously entered. They filed an affidavit calling attention to the amended affidavit, and objected to the return of the summons with the amended affidavits, claiming them to be insufficient, but did not controvert any fact stated in them, and defendants did not ask to have the order entered *nunc pro tunc* vacated for any reason.

7. Defendants assign as error that plaintiff is not the real party in interest and has no right to prosecute the action, and that this issue is raised by the pleadings, and the court did not find upon this issue. The court found that plaintiff was the owner and holder of the notes and mortgage when the action was brought, and the evidence shows he took them by written and recorded assignment May 1, 1891. There is some evidence tending to show that he originally took them while acting for the First National Bank of Fresno, of which he was president, but he testified that he finally bought them outright. The written assignment of Thomas E. Hughes (mortgagee), dated February 12, 1893, to W. M. Hughes of all his right to the notes and mortgage is in evidence, and in it he recites that the notes and mortgage are held by O. J. Woodward (plaintiff) and the First National Bank as collateral security for his indebtedness to them. It does not appear that plaintiff had knowledge of this assignment, and, even if he had, his assignor could not bind him by recitals in an assignment to another assignee. The finding is justified by the evidence, and substantially finds on the issue raised by defendants' answer.

8. Defendants claim that the affidavit for the order of publi-

cation of summons is void, as not in compliance with section 412 of the Code of Civil Procedure. The affidavit gives the names of the defendants and states that they resided without the state, and names the state in which each resides; it refers to the verified complaint and makes it a part of the affidavit, and states that the defendants are proper and necessary parties to the action; that affiant has a good cause of action against the defendants, as he is advised by his counsel and verily believes. The complaint states a good cause of action. It was not necessary to state that the sheriff had returned the summons, and it is immaterial whether the summons had been returned when the affidavit was made. I see no defect in the affidavit.

9. It is further objected that the affidavit of publication is void because it does not state that affiant was the foreman, printer, or principal clerk, and does not state that the summons was published once a week, nor the length of time published. (Citing Code Civ. Proc., sec. 415.) The affidavit was sworn to by the publisher and proprietor of the paper. The code, *supra*, says the proof must be made by the "printer, or his foreman or principal clerk." It was held under the practice act, where the word "printer" is used, that the word "proprietor" is, in the sense of the statute, synonymous with "printer." (*Quivey v. Porter*, 37 Cal. 458.) There is nothing in this point. The affidavit states that the *Madera Tribune* is a daily and weekly newspaper, "and that the summons, of which the annexed is a true and correct printed copy, has been published weekly in the said newspaper, commencing on the seventeenth day of May, A. D., 1894, and ending on the twenty-sixth day of July, A. D. 1894, inclusive, in each and every one of the consecutive weekly issues of said newspaper issued during said period of time, being the regular weekly issues thereof." Some doubt might arise as to which one of the papers, the daily or weekly, is referred to by the terms "said newspaper," whether the subject referred to was the daily or the weekly. The affidavit shows further on that the paper referred to was the "regular weekly issue." It does not appear on what day of the week the weekly paper is published, but the affidavit says the publication began on the 17th and was published weekly. The time stated would give twenty insertions and embrace seventy days. I think the

affidavit shows a sufficient length of time and that the publication was once a week.

9. Defendants also complain of the application made of the several payments; that they should have been credited first on the three year note, second on the four year note, and third on the five year note, and that if they had been so applied there would have been nothing due on December 19, 1893, when the action was commenced. (Citing Civ. Code, sec. 1479.)

It appears from the evidence that the first note, due in three years, to wit, on September 28, 1892, was paid in full at maturity. The second note fell due September 28, 1893, and this action was brought December 19, 1893. There is no evidence as to plaintiff's exercise of his option to regard the unpaid notes as due, which by their terms was given, except the bringing of the action. It is in evidence that no payments were made to plaintiff except such as were indorsed on the notes. When the suit was brought the second note was past due, and if all the payments made after the first note was paid had been indorsed upon the second note, instead of being indorsed partly on it and partly on the last note as was done, there would still have been an unpaid balance on the second note. The notes bore the same rate of interest, and defendants were not injured by the alleged misapplication of the payments. The last note became due on December 19, 1893, by the commencement of the action, and it was not necessary to the exercise of the option to regard it as due that previous notice should have been given to Brown or Hughes, for there was still due some unpaid interest on both notes and some unpaid principal on the second note, and, besides, the beginning of the action operated as an exercise of the option. (*Hewitt v. Dean*, 91 Cal. 5.)

10. Defendant Etter purchased from the John Brown Colony, February 23, 1892, and his lots have not been released. He sets up a defense special to himself, to wit, that Hughes, the mortgagee, on November 26, 1892, received from him \$325 on lots 7, 8, 9, and 10 of block 28, and agreed to release the lots from the mortgage and "hold him harmless and secure in the title to said lots." The agreement was in writing and is in evidence. This was nine months after he had purchased and obtained a deed, and one year and seven months after the notes and the mort-

gage were assigned to plaintiff; there is no evidence that plaintiff received this money, or had any knowledge of its payment to Hughes, and in his answer Etter does not allege knowledge in plaintiff, but claims that Hughes was and is the real owner of the mortgage, and that it was simply pledged with plaintiff to secure payment of Hughes' indebtedness to plaintiff. Clearly, without proof of knowledge of this agreement or consent thereto, implied or otherwise, by plaintiff, it cannot bind plaintiff and is no defense. Even if Hughes was the real owner of the mortgage, and plaintiff held it and the notes as security only, Hughes could not bind plaintiff by any such agreement without his knowledge or consent, and there is no evidence that he had any knowledge until the answer was filed. Section 1487 of the Civil Code and the case of *Mahler v. Newbeur*, 32 Cal. 168, 91 Am. Dec. 571, cited by defendants, do not conflict with this view. Defendants cite numerous authorities, among them Jones on Mortgages, section 479, to the effect that the record of assignment of a mortgage is not constructive notice of it to the mortgagor so as to make invalid a payment made by him to the mortgagee. But that author also says in the same section that the record of assignment of the mortgage is part of the record title of which a purchaser of the equity of redemption must take notice. I do not think any case can be found holding that a payment, by a purchaser, of part of the mortgaged premises, to a mortgagee who had previously assigned both notes and mortgage, and the assignee had recorded his assignment and had possession of the notes when payment was made, would be good against the assignee of the mortgage who had not consented thereto. The cases cited are not in point.

11. A question arises as to the effect of the sale of blocks 51 and 60 by McDonald to Dorn on January 20, 1892, on which day McDonald conveyed the residue of the mortgaged premises (except block 65, previously sold and released) to John Brown Colony, a corporation. The Dorn blocks were released February 23, 1892, by plaintiff. Brown conveyed the property to McDonald October 8, 1891, by grant deed, burdened with the debt as it stood when Brown conveyed. It is conceded by plaintiff's counsel that if the conveyance to John Brown Colony had been made and delivered before the conveyance to Dorn, and plaintiff

had actual knowledge of that fact at the time he released these blocks, plaintiff would have been compelled to credit his mortgage notes with their market value in case of the parcels conveyed to John Brown Colony, which was found to be \$8,000, whereas he released for a payment of \$5,000. But plaintiff contends that the burden is on the defendants to show these facts, and that neither of the facts existed. The court found that plaintiff had knowledge of both of these deeds when he released these blocks. They bear the same date and were acknowledged the same day, but the Dorn deed was recorded January 23rd, while the John Brown Colony deed was recorded January 26th. The \$5,000 payment was credited on the notes. There is no evidence beyond the foregoing tending to show which one of these deeds in point of fact was first delivered. We think that the burden was upon defendants to show that these blocks were conveyed to Dorn after the conveyance to John Brown Colony, and, not having done so, we must presume that the evidence supported the judgment and that the colony deed followed the Dorn deed. As, therefore, the John Brown Colony lands were first liable, that corporation could not and does not complain of the release to Dorn. Brown cannot complain if no deficiency is allowed against him, and the other defendants cannot complain because their deeds were subsequent to the John Brown Colony deed, and plaintiff had no knowledge of them.

12. It is also claimed that the amended complaint was filed after order of publication of summons, and was not served by republication of summons, nor was it served on any of the defendants, except R. H. McDonald and W. S. Chapman. *Thompson v. Johnson*, 60 Cal. 292, and section 472 of the Code of Civil Procedure are cited. It was held in *Thompson v. Johnson, supra*, that, where a plaintiff amends in matter of substance, he, in effect, opens the default on the original pleading, and must serve his amended pleading upon the parties, including the defaulting defendant.

The amendment here was not such matter of substance as would bring the case within the rule above laid down. The complaint alleged the amount due on the notes, and that plaintiff had exercised his option to regard the notes as due. The

amendment simply set out the indorsements of payments on the notes, from which it could be ascertained just what appeared in the complaint; it was somewhat in the nature of a bill of particulars. The only other allegation was as to the option, and that appeared in the original complaint. There is no merit in this point.

13. Defendants objected to pretty nearly all the evidence introduced by plaintiff, in chief, but I find no alleged error meriting notice. On cross-examination of plaintiff, when on the witness stand, he was asked how much was due on the mortgage and how much he paid for the mortgage; to the latter question plaintiff's counsel objected, and the court sustained the objection, very properly, I think. It was immaterial what he paid.

He was asked on cross-examination if there was anything owing to the First National Bank above what it paid for the mortgage. The plaintiff objected as immaterial and irrelevant, and the court refused the question. I cannot see wherein defendants were injured by this refusal. Nor, later on, when the court refused defendant's question as to whether the witness had any interest in the suit. He had testified that there was due him a certain amount on the notes, and, while the question was not an improper one, I cannot see that the answer, whatever it might have been, would change the result. For the purpose of bringing the action his possession of the notes and mortgage, even if he had held them for collection, would have been sufficient to sustain his right of action, and, later on, in answer to defendant's question, he testified that he "bought the mortgage right out."

It was also immaterial when he got absolute title, and a question as to the time was immaterial, and so also was it immaterial whether he advanced other money upon the mortgage than the amount he had testified to. The court might well have allowed more freedom of cross-examination, but it appears that the defendants were not prejudiced in their substantial rights by any restriction imposed by the court. These alleged errors are not urged in defendants' brief.

14. Defendants complain that W. E. Johns, a defendant, was a purchaser from Madera Fruit and Land Company subsequent to the Bank of Madera title; that he was not served with summons and did not appear, but that the court ordered the prop-

erty of the Madera Bank to be sold before the sale of Johns' lots. The evidence shows that Madera Fruit and Land Company sold to Johns, July 13, 1893, block 73 for \$4,000, and the deed was recorded July 14, 1893. The Bank of Madera took its deed from the sheriff, dated March 12th, acknowledged April 9th, and recorded April 10, 1895. The writ in the attachment suit, under which the sale was finally made, was levied June 2d, and a copy recorded June 3, 1893, and the sheriff's deed took effect, by relation, from the levy of attachment. (*Porter v. Pico*, 55 Cal. 165; *Jones on Mortgages*, sec. 1623.) No question is raised as to the validity of the attachment. Jones was personally served, as shown by the affidavits of service, and his default was entered. This conveyance of the Johns' block apparently was the last one affecting the property. The order directs the sale of: 1. The lands held by the Madera Fruit and Land Company; 2. The lands of Bank of Madera; 3. The residue in the inverse order of alienation as shown by the recordation of the various deeds, to wit: (a) The parcels conveyed by the Madera Fruit and Land Company in the inverse order of the deeds; (b) The parcels conveyed by the John Brown Colony in like order; (c) The parcels conveyed by John Brown in like order. I find in tabulating these various deeds and the order of sale prescribed in the decree, that Johns' block is the thirty-third parcel or groups of parcels ordered sold. The previous parcels ordered sold belonged to Madera Fruit and Land Company and Bank of Madera. The Madera Fruit and Land Company took by deed dated January 19, 1893; the Bank of Madera (through its attachment) as of June 3, 1893. If the sheriff's deed is to be given effect as of date June 3, 1893 (date of attachment), it was error to decree the sale of the Bank of Madera lots before selling the Johns' block. That it must be so treated is beyond question. If the Madera Fruit and Land Company had sold to the Bank of Madera on June 3d, and afterward on July 13th had sold to Johns other of the mortgaged lands, clearly Johns' land should be first sold, and I can see no difference arising, in these relative rights, from the fact that the title of the bank came through the attachment. The lien attached June 3d, and if that lien is to have any value it must be held to be good as against Johns. He had constructive notice of it, and should be charged with construc-

tive notice of all the consequences to flow from it. The defendant, Bank of Madera, is directly and may be injuriously affected by this order of sale. The learned judge who tried the case evidently treated the sheriff's deed as the inception of this defendant's rights, as he found that the bank became the owner March 12, 1895, and, if that had been the fact, the decree to sell Johns' land last would not have injured the bank; but it was not the fact.

15. The decree directs the sale of lot 23, block 28, toward the last of the parcels to be offered. It was embraced in the mortgage, and was conveyed by Brown to McDonald, and by him to the John Brown Colony, and by the colony to the Madera Fruit and Land Company, and by that company to Cecil Ricketts by deed dated January 26, 1893, recorded March 25, 1893. He was not made a defendant and does not appear, and his lot has not been released. There is no finding of the court as to the then owner of this lot. To order its sale was clearly error. He was a necessary party in adjusting the equities of the various purchasers, as much so as numerous others who were brought into court. (*Porter v. Miller, supra.*)

16. Lot 4, block 64, is among the earlier parcels ordered sold. Title is in Madera Fruit and Land Company. The remaining lots in the block come later in order of sale. Title is found by the court to be in Bank of Madera of the whole block except lot 4. The sheriff's deed to the bank describes lots 1 to 3, 5 to 6, and 22 to 32. The deed from Brown to McDonald conveyed the whole block; McDonald conveyed the whole block to John Brown Colony, and the John Brown Colony conveyed to the Madera Fruit and Land Company, through which Bank of Madera takes title only to lots 4 to 14 and 25 to 32. This chain of title leaves lots 1 to 3 and lots 15 to 24 in John Brown Colony, and this would necessarily change the order of the sale. I can find in the record no releases and no conveyances of these lots 1 to 3 and 15 to 24, except as above shown. The mortgage describes all of block 64.

The decree orders these lots sold as belonging to Bank of Madera, and makes no provision for the sale of any lots belonging to the John Brown Colony, assuming, I suppose, that there were none. So far as the John Brown Colony is concerned, not hav-

ing appeal it cannot be heard to complain of the order in which sales were directed to be made, but the sale of its lands which remain subject to the mortgage must, with reference to other defendants, and especially as to those appealing, be made with due regard for their equities.

I find no mortgaged lots still in John Brown, and no lots still in McDonald, or any immediate grantee of Brown, or in the grantee of any grantee of Brown, which have not been released. If there should be any held by his grantees, the decree properly places them last in order of sale, being first alienated.

17. The court found that lots 1 to 6 and 26 to 32, in block 28, belonged to Bank of Madera, and these lots are ordered sold as its property, with other of its lots. The record shows that the Madera Fruit and Land Company sold lots 26 to 32 in this block to W. E. Davis by deed recorded July 14, 1893. There is no evidence of any transfer by Davis or of any release of the lots. Davis appeared by his attorney and notice of the appeal was served upon said attorney, but Davis does not appeal. There are several similar transfers. The interest of such grantees should be sold before that of the Bank of Madera because its deed relates back to June 3, 1893.

18. It is claimed that the sixteenth finding (fourteenth intended) is not sustained by the evidence, in this, that the evidence shows that Bank of Madera is owner of the west half of block 59 and is not mentioned in the finding, and that Bank of Madera is not the owner of lots 27 and 28, block 53, mentioned in said finding. The court found that all of block 59 was released September 4, 1891. The west half of block 59 came by mesne conveyances into Madera Fruit and Land Company, and was part of the property attached.

John Brown sold to one Boyd lots 1 to 14 of this block September 1, 1891, and the west half of the block October 8, 1891, to McDonald and McDonald conveyed to Madera Fruit and Land Company. The mortgage that was introduced in evidence showed an indorsement as follows: "Released by O. J. W., September 4, 1891, block 59." Plaintiff alleges the release of the whole block September 4, 1891, and this is not denied; on the contrary, defendant Bank of Madera sets out in its answer the date of the release and that it was indorsed on the margin of the

mortgage in the record of mortgages. The evidence justifies the finding as to this block.

Lots 27 and 28, block 53, appear by the evidence to belong to the Madera Fruit and Land Company, and should be sold before the lots of the Bank of Madera are sold

19. The twentieth finding is attacked on the ground that the attorney of plaintiff is not shown to be entitled to any sum as attorney fees. The mortgage provided that in case of default, etc., "the mortgagee may foreclose the mortgage, and may include in such foreclosure a reasonable counsel fee to be fixed by the court," etc. There was an allegation in the complaint that the sum of \$1,000 is a reasonable sum as attorney's fees for the prosecution of the action. This was denied. There is no evidence as to employment or value of the services. The court found the sum of \$750 to be a reasonable sum to be allowed, and it was carried into the decree. The attorney brought the action and tried it and this appears from the record; no further evidence of employment was required. The duty of fixing the amount of compensation was cast upon the court, and no evidence of value of the services was necessary. (Stats. 1873-74, p. 707; *Carriere v. Minturn*, 5 Cal. 435; *Monroe v. Fohl*, 72 Cal. 571; *First Nat. Bank v. Holt*, 87 Cal. 158; *White v. Allatt*, 87 Cal. 245.)

The decree should be modified in the following particulars:

1. The lots belonging to W. E. Johns should be sold before the lots belonging to the Bank of Madera are offered;
2. Lots 1 to 3 and 15 to 24, block 64, should be sold before the lots of Madera Fruit and Land Company;
3. Lots 27 and 28, block 53, should be sold among other of the lots belonging to the Madera Fruit and Land Company;
4. The Bank of Madera deed must take date of June 3, 1893, and the order of sales be directed with reference to that date, as in the case of W. E. Davis and other like it;
5. The provision of the decree for deficiency judgment should be stricken out;
6. Before further proceedings are had Cecil Ricketts should be made a party defendant, by due service of process, with the right to answer and litigate any issues properly raised by him; and should there be found other grantees of the mortgaged premises, not defendants, whose deeds were recorded prior to the commencement of the action, and who are necessary

parties, leave should be given to bring them in also on like terms.

The deed of the lots to Ricketts was dated January 26, 1893, but Rosenthal's and Lazar's deeds were made subsequently, so that as to these two defendants their lots should be sold before Ricketts', and his appearance cannot affect them. As to Etter, however, his deed antedates Ricketts', and Etter's lots should not be sold until after Ricketts' is sold. The defendants who have appealed should be allowed to be heard upon all issues raised by any new defendant in any way injuriously affecting them. But I see no reason for reopening the whole case and granting a new trial, for it appears that only one defendant can be affected by the appearance of Ricketts, and he only as to the order in which sale should be made. In view of the fact that at least one other person must be made a party, it becomes impracticable for us to point out the precise order in which all the various parcels must ultimately be sold. The principle adopted by the learned judge who tried the case is the correct one, as the facts now stand. If no new fact should appear, upon a further hearing, affecting the rule as in this opinion set forth, the sales should take place finally by first exhausting the property (if there be any) of the mortgagor and of McDonald and of the John Brown Colony in the order named, and then by sale of the residue in the inverse order of the various alienations as shown by the recordation of the various deeds—placing the last lots of the residue, to which there is a recorded deed, first in order of sale and so on to the first lots sold—treating the deed of the Bank of Madera as of June 3, 1893.

It is recommended that the case be remanded for further proceedings in accordance with this opinion, the costs of this appeal to be allowed to the appealing defendants.

Searls, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion it is ordered that the case be remanded for further proceedings in accordance therewith, the costs of this appeal to be allowed to the appealing defendants.

McFarland, J., Temple, J., Henshaw, J.

[L. A. No. 252. Department Two.—December 15, 1897.]

REBECCA R. ORD PESHINE, Respondent, v. ELIZA G. ORD et al., Appellants.

MORTGAGE BY DEED ABSOLUTE—ADVERSE POSSESSION OF MORTGAGEE—PRESCRIPTIVE TITLE.—The fact that a mortgagor cannot maintain ejectment against his mortgagee in possession until the mortgage debt is paid does not preclude the mortgagee from acquiring a prescriptive title by adverse possession; and where the mortgage was in the form of a deed absolute on its face, and it appears that subsequent to conditions broken there was a hostile possession of the mortgagee under claim of title to the knowledge of the mortgagor, for more than five years, a prescriptive title is acquired by the mortgagee, and all remedy of the mortgagor, and of those claiming under him, is lost by limitation.

ID.—QUIETING TITLE AGAINST MORTGAGEE—MAXIM—CONDITION OF ACTION—STATUTE OF LIMITATIONS—LOSS OF REMEDY.—A mortgagor, or his successor in interest, who seeks to quiet title against the mortgagee in possession, is bound by the maxim that he who seeks equity must do equity, and must pay the mortgage as a condition of success in the suit; but if the mortgagee in such a case denies that there is any equity to be done by the mortgagor, and has asserted title in himself, the mortgagor or those claiming under him must proceed against the mortgagee within five years after an adverse claim of title has been made manifest, or lose all remedy, whether the debt or obligation secured by the mortgage has been paid or not.

ID.—DIVESTITURE OF TITLE OF MORTGAGOR—DECREE OF DIVORCE—SUBSEQUENT ACTS OF MORTGAGOR NOT BINDING—ADVERSE CLAIM.—Where the title of the mortgagor has been divested by a decree of divorce, his subsequent acts are those of a stranger to the premises, and cannot defeat any rights acquired under the decree; and an agreement made in a subsequent action brought by the mortgagor against the mortgagee in possession, by the terms of which the mortgagor agreed that the mortgagee was the owner of the premises covered by the decree of divorce, cannot defeat the rights acquired under that decree, though such agreement may serve to manifest an adverse claim to the premises by the mortgagee, and to show that no redemption was contemplated between the parties to the agreement.

APPEAL from a judgment of the Superior Court of Santa Barbara County. B. T. Williams, Judge.

The facts are stated in the opinion of the court.

Richards & Carrier, for Appellants.

Wright & Day, for Respondent.

THE COURT.—Action to quiet title to a portion of a certain lot No. 97, outside of the town of Santa Barbara. On January 29, 1875, James L. Ord, then the owner of said lot 97, executed a deed purporting to convey the whole thereof to one Robert B. Ord, his brother, for the expressed consideration of fifteen hundred dollars. On August 20, 1875, in an action of divorce between said James and his wife, Augustias de la Guerra de Ord, the former district court rendered a decree whereby, in terms, a tract of eighteen acres off the west side of said lot—approximately one-half of the same—was apportioned and set over to the wife. Plaintiff is the daughter of James and Augustias, and whatever title to the land was acquired by Augustias in virtue of said decree passed by her deed of gift, made June 1, 1878, to the plaintiff, who was then of full age. The present action was begun on December 8, 1891. Plaintiff claims that the deed of January 29, 1875, by James to Robert Ord, was intended to operate as a mortgage only; that the obligation secured thereby was discharged, and hence that the title she deraigns through her mother is valid against the defendants, who are the heirs at law of said Robert. Defendants deny these pretensions of the plaintiff, and plead also the statutory limitation—five years—prescribed for actions to recover real property, or to redeem from a mortgagee thereof in possession. (Code Civ. Proc., secs. 318, 319, 346.) All the issues were found in plaintiff's favor by the court below.

It is alleged by plaintiff that the deed of January 29, 1875, was made to secure the payment of money, and the finding of the court was similar; it was not alleged nor found what amount was thus secured, nor when it was payable, nor to whom; but it seems to have been the theory of the case made for plaintiff that Robert Ord became security on the note of James Ord to a certain bank, payable June 26, 1875, and that James made said deed to indemnify Robert against loss from such relation of suretyship; that Robert paid the note, and afterward received funds of James sufficient for his reimbursement. Much vagueness permeates the plaintiff's case, though possibly the findings and judgment should not fall on this account alone. (*Cline v. Robbins*, 112 Cal. 581.)

Subsequently to the decree of August 20, 1875, by which, plaintiff alleges, title to the tract in suit passed from James Ord, said James made to Robert Ord other conveyances of land in the same vicinity, all absolute in form, but claimed now by James to have been executed by way of mortgage or else in trust to be managed and controlled by Robert for the benefit of James to pay the latter's debts and for other purposes. Some of the lands included in these transactions were retransferred by Robert to James in 1876; the residue, together with the parcel in controversy here, continued in Robert's possession. In the month of October, 1886, as appeared from the evidence for plaintiff, James demanded of Robert a reconveyance of the property, and thereupon Robert repudiated and disavowed any fiduciary relations with James and refused to account for the profits of the land, and refused to convey any portion thereof remaining in his possession. On September 22, 1887, James instituted a suit against his brother for an accounting and to enforce a reconveyance of the property; pending which action, on October 20, 1889, Robert died. On June 28, 1890, a compromise of the suit was agreed upon in writing between James and the representatives of said deceased, with the approval of the defendants here, and in February, 1891, a judgment was entered disposing of the case accordingly. By the terms of such written agreement it was declared, in substance, that said James was the owner of certain parcels of the land described in his complaint in that action, that Robert had held the same in trust for him, and that such trust was fully executed; but, as to other portions of the lands which were the subject of the suit, including the tract involved in the present action, it was declared that James had no right, title, or interest, legal or equitable, in or to the same, and that Robert was the owner thereof when the action was begun, and that his heirs (the defendants in the present action) were owners of the same at the time of such agreement; said agreement contained no admission that the deed of January 29, 1875, ever had the character of a mortgage. There was further evidence, without conflict, that soon after the decree in the suit for divorce by which the parcel here claimed by plaintiff was set over to her mother the latter requested a deed thereof from Robert Ord; that he refused, and then asserted that he had purchased the property

for cash paid to his brother, and that he owned the same. Robert Ord had exclusive and notorious possession of the land from 1875 until his death, and such possession was continued by his representatives or heirs after his death, and for more than five years next before the commencement of this action Robert and his said successors paid the taxes thereon.

"It is a settled rule," said the court in *Spect v. Spect*, 88 Cal. 443, 22 Am. St. Rep. 314, "that a mortgagor cannot maintain ejectment against his mortgagee until the debt is paid." Invoking this principle, counsel for plaintiff contend that from 1875 to 1890 the statute of limitations was not in motion against her title. They say that the mortgage "was not actually satisfied and discharged until the settlement, which was concluded June 28, 1890. Then for the first time a right of action by this plaintiff for possession of the premises accrued." But, from the inability of the mortgagor or his successor in the title to maintain an action to recover the premises in the possession of the mortgagee without discharging the mortgage, it does not at all follow that he may not be barred by adverse holding of the mortgagee. If the evidence here shows that the deed of January 29, 1875, by James to Robert Ord was a mortgage, it also shows that the condition thereof was broken years before the action commenced by the mortgagor against the mortgagee to compel a reconveyance. Of course, he who seeks equity must do equity, and a mortgagor who seeks to quiet title against the mortgagee in possession must pay the mortgage as a condition of success in his suit (*Brandt v. Thompson*, 91 Cal. 458); but if the mortgagee in such a case denies that there is any equity to be done between him and the mortgagor, asserts title in himself, and otherwise manifests an adverse holding, the mortgagor or those claiming in his right must proceed against him within five years or lose all remedy, whether the debt or obligation secured by the mortgage has been paid or not. (Code Civ. Proc., sec. 346; *Warder v. Enslen*, 73 Cal. 291.) Here there was a clear showing of a hostile holding against both James Ord and the plaintiff, beginning at least as early as the year 1886 and continuing for more than five years before the commencement of the action. Had James Ord not been divested of the title, and had he omitted to bring any action until the time the plaintiff set on foot the present suit—Decem-

ber 8, 1891—it is plain he would have been barred, and we think the plaintiff is in no better predicament. Her remedy was not saved by the action brought by James against Robert in 1887; the title of James was divested in the divorce suit twelve years before, and thenceforward his acts were those of a stranger to the premises. (*Barber v. Babel*, 36 Cal. 20, and cases cited.) Besides, he agreed with the heirs of Robert in that action that they were the owners of the land. Of course, this fact could not defeat any rights of the plaintiff, but it shows that as against her there was no abatement of the adverse claims of the defendants, and that no redemption of the land was contemplated by the parties to such agreement.

It follows that the finding that the alleged mortgage was discharged by the settlement of June, 1890, is not supported by the evidence. With the overthrow of this finding the judgment must fall.

For the foregoing reasons the judgment and order appealed from must be reversed, and it is so ordered.

[L. A. No. 253. Department Two.—December 16, 1897.]

MARIANO GARCIA, Appellant, v. PETER GUNN et al., Respondents. G. A. MACOMBER, Intervenor.

CLAIM AND DELIVERY—RIGHT OF POSSESSION—SUBSEQUENTLY ACQUIRED TITLE.—To sustain an action of claim and delivery of personal property, the plaintiff must have a right to the immediate and exclusive possession thereof at the time of the commencement of the action, through some general or special property therein, though it is not essential that plaintiff should ever have had actual possession of the property claimed. A subsequently acquired title is not alone sufficient to sustain the action.

ID.—SKINS OF WILD GOATS—LEASE OF ISLAND BY MEXICAN GOVERNMENT—TITLE OF ASSIGNEE—ASSIGNMENT WITHOUT CONSENT—BREACH OF CONDITION—SUBSEQUENT CONSENT.—A lease of an island by the Mexican government to the assignor of plaintiff, conferring a right to utilize the wild goats thereon, with a right of selection for the purpose of killing them in moderation, and containing a condition against assignment of the lease without the consent of the lessor, conferred upon the lessor only the option to forfeit the lease for breach of the condition, and the assignment

thereof to plaintiff without previous consent of the lessor was not void, but passed the term to plaintiff, and upon subsequent consent of the Mexican government to the assignment, the assignee took all the rights of the lessee as of the date of the assignment, and became entitled to the immediate and exclusive possession of the skins of wild goats taken from such island subsequent to the date of the assignment.

ID.—EFFECT OF RESERVATION NOT SELECTED—CONDITION SUBSEQUENT—OPTION OF GOVERNMENT.—A reservation in the lease of the island of fifty hectares for public use, not designated or selected, but to be decided upon by the Mexican government, has the effect of a condition subsequent at the option of the government; and until the selection should be made by the government, the plaintiff had the right to the whole island, and to the control and right of possession of all the goats thereon.

ID.—TRESPASS AND KILLING OF GOATS—ELECTION OF REMEDY—CLAIM AND DELIVERY.—Although the plaintiff might have maintained an action of trespass for the action of trespassers in entering wrongfully upon the island and killing the goats and taking away their skins, he was not confined to that remedy; but such action was an interference with plaintiff's right of possession and control of all of the goats, which entitled him to elect to recover the possession of the skins in an action of claim and delivery; and it is immaterial that plaintiff had not the right to kill all of the goats killed by the trespassers.

ID.—DAMAGES FOR DETENTION — INTEREST ON VALUE OF PROPERTY.—Where the judgment allowed one dollar as damages for the detention of the property, it cannot also allow interest on the value of the property from the date of the taking, which, if it could be allowed at all, can only be allowed as damages for the detention.

APPEAL from a judgment of the Superior Court of San Diego County and from an order denying a new trial. George Puterbaugh, Judge.

The facts are stated in the opinion.

Works & Works, for Appellant.

M. B. Anderson, Leovy & Palmer, and George J. Leovy, for Respondents.

Henley & Costello, and D. M. Hammack, for Intervenor.

CHIPMAN, C.—Claim and delivery for certain four thousand and fifty-six goatskins of the value of twelve hundred and sixteen dollars and eighty cents.

The court found against the plaintiff and in favor of defendant Porter, upon the issue of ownership and right of possession;

it also found that the sheriff of San Diego county took the property from the possession of said Porter, and has since delivered it to plaintiff, who still retains it. The trial was by the court and judgment passed for defendant Porter, and this appeal is from the judgment and from the order denying a new trial, and is here on bill of exceptions.

It appears from the evidence that Guadalupe island is situated about two hundred miles south of San Diego and about the same distance off the shore of Mexico, and belongs to that republic; that large numbers of wild goats — estimated as amounting to twenty-five thousand—roam at will over this island, which contains about one hundred and eighty square miles. It appears without conflict that the skins in question were taken from wild goats, and were brought from that island by defendant Gunn at the instance of defendant Hunt and delivered to the latter in August, 1893, at San Diego, who sold them to defendant Porter.

The court made no finding as to where the skins came from, except that they were "not taken from Guadalupe island wrongfully"; nor as to where the goats, from which the skins were taken, were running when killed. It made no finding as to whether the skins were taken from wild goats, nor did it make any finding as to the lease under which plaintiff claims; nor as to its assignment, nor as to the rights of plaintiff thereunder. We are left in the dark as to the theory upon which the findings and judgment are founded as to these matters. They are, however, fully discussed in the briefs.

1. Defendants contend that at the time the suit was brought plaintiff was not entitled to the immediate and exclusive possession of the property. To sustain the action there must be such right, through some general or special property in the skins, although it is not essential that plaintiff should have ever had actual possession of them. A subsequently acquired title is not alone sufficient. (*Wells on Replevin*, sec. 94; *Cobbey on Replevin*, secs. 96, 100; *Cardinell v. Bennett*, 52 Cal. 476; *Fredericks v. Tracy*, 98 Cal. 658.)

Plaintiff claims under a lease of said island executed by the Mexican government to one Vilarasau, dated June 20, 1891. The lease provided that it should not be transferred or assigned with-

out the previous consent of the lessor, and was to run for twenty years.

On January 11, 1892, Vilarasau, at the City of Mexico, made a declaration to which plaintiff affixed his signature before a notary public, to the effect that the said lease was entered into under instructions from and for the special benefit of plaintiff, and also then and there assigned the concession to plaintiff, the latter agreeing to fulfill the obligations of the contract undertaken by Vilarasau, and also to obtain the consent of the Mexican government to the assignment.

A document dated June 27, 1894, from the department of the interior, is in evidence, which apparently is addressed to Vilarasau in reply to his letter setting forth the facts contained in the assignment of January 11, 1892, to plaintiff (Garcia). This document of June 27, 1894, concludes as follows: "In reply, I declare to you that, taking into consideration what has been explained, this department approved the transfer, . . . and will recognize him (Garcia) hereafter as the grantee of said agreement, with all the rights which may accrue from it." Plaintiff claims that this action of the government was conclusive and cannot be questioned by a stranger, especially by wrongdoers, in their defense. (Citing numerous cases.)

Defendants' position is, that Garcia when he brought the suit was not the proper party in interest; that by the laws of Mexico introduced in evidence, and the terms of the concession, such rights as thereby passed from the government became vested in Vilarasau as an individual, regardless of any private understanding he may have had with others; and the consent of the government to an assignment was a condition precedent to the vesting of such rights in another; and that plaintiff had not the right of possession when he brought the suit.

It seems to be the law that where there is a clause in a lease that it shall not be assigned without the previous consent of the lessor, and there is a breach of the covenant not to assign, the lessor has only the option to forfeit the lease for the breach of the condition, and that the assignment is not void but passes the term, and the only remedy is for breach of the covenant (*Randol v. Tatum*, 98 Cal. 390); and it has been held that the

assignment is voidable only at the option of the lessor or his representatives. (*Webster v. Nichols*, 104 Ill. 160.)

As the Mexican government not only did not proceed to have the lease forfeited because of the assignment, but consented thereto, it follows that plaintiff took the term *eo instante* of the assignment with all the rights of the lessee under it.

2. The question next is one of fact, namely: Were the skins taken from goats killed on the island? Upon this point the evidence is chiefly circumstantial, but cannot be said to be conflicting. Defendants claim that there is no evidence of this fact, and therefore plaintiff cannot recover. We do not deem it necessary to state this evidence fully. It has had careful examination. What view was taken of it by the trial court we do not know. If the learned judge held that plaintiff had no rights under the lease at the time the action was brought, it became immaterial whether the goats were killed on Guadalupe island or elsewhere, and this was probably the conclusion reached at the trial.

Defendants make no claim to the island adverse to plaintiff or otherwise; they make no claim to the skins except that they had a right to take them from wild goats running on this island; they offer no proof of ownership except that the skins were wild goat skins, and they remain silent as to where the goats were running when killed and skinned. We think the evidence established, *prima facie*, the fact that the skins were taken from wild goats running on Guadalupe island, and that enough was shown upon this fact to cast upon defendants the duty to show where they got the skins, if it was true that they came from some other island—a fact easily proven by them. The hunters from whom the skins were received by Gunn on Guadalupe island were trespassers. Unless they had a right to kill wild goats running there (which will be noticed next), they were wrongdoers in killing them.

3. Defendant Porter denies the ownership of the goatskins in plaintiff, but does not deny the taking; he claims: 1. "That the lease by its terms did not purport to give such rights, exclusive or otherwise, in reference to the wild goats on Guadalupe island, as to prevent others from hunting them, or as to make the product of such hunting by others the property of the lessee"; and

2. "That the laws of California and of the United States generally as to wild game was that the government held all wild game, without power of alienation, in trust for the people, and gave to the hunter the fruit of his labors." It is claimed by plaintiff that under the lease he had a property interest in the wild goats running upon this island, and that defendants invaded this right in taking away his property.

The property right to the wild goats was, without question, in the republic of Mexico—this is conceded by all parties. In the lease are the following provisions: "Art. 4. The lessee shall have the right to utilize the wild goats. . . . Art. 5. The utilization of the wild goats and of the woods shall be in moderation so as not to destroy the one nor the other. The lessee obligates himself not to destroy nor to avail himself of all the wild goats and their young which should remain in favor of the government during the last two years. The government can name opportunely the inspector for the purpose of informing it of the condition of the woods and of the wild goats." It would seem to be obvious that the government passed to the lessee dominion over all the wild goats, with a right of selection for the purpose of killing them in moderation, and that it did not reserve to itself any control over them beyond that of inspection. But defendants say "the government reserves absolutely on each island an area of fifty hectares for public uses." (Mex. Stats., art. 29; Trans., fol. 184.) (A hectare is 2.7 + acres.) Also, "always reserving in the government the extension of the land which the law designates and in the place it decides upon." (Contract, art. 8; Trans., fol. 77.) Defendants claim that the record is silent as to how much land has been so granted and occupied on the island, and, as there was no segregation of these interests, it cannot be ascertained from the evidence that the goats were killed on plaintiff's portion, and there is a failure of proof. Defendants would have us assume that all these goats might have been killed on this reservation of about a hundred and thirty-five acres. The lease was for "the island of Guadalupe in the Pacific Ocean for the term of twenty years." The reasonable and fair construction of the reservation referred to is, that until the government should select the land reserved, plaintiff had the right to the whole island

and certainly to the control of all the goats thereon. The reservation was a condition subsequent and at the option of the government.

It is claimed by defendants that "wild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except so far as the people may elect to make it so." (Citing *Ex parte Maier*, 103 Cal. 482; 42 Am. St. Rep. 129.)

The contention of defendants was made the subject of very careful consideration in *Kellogg v. King*, 114 Cal. 378; 55 Am. St. Rep. 74. The section of our Civil Code (656) relating to ownership of wild animals was there given a construction, and the general doctrine relied upon here by defendants was found to be incorrect.

But it is claimed by defendants that plaintiff had no right under the lease to any specific goats; that while he had the right to utilize and kill some of them and in moderation, he did not have the right to all of them or to any particular ones, and that even though defendants were wrongdoers the action of replevin would not lie for the killing and taking away the carcasses or the skins; that the remedy, if there be any, is for trespass. Plaintiff was given dominion over all the goats, with the right of selection for the purpose of killing or other utilization; it was a right to the immediate possession of all the goats. It was not necessary that he should have the absolute ownership of all of them. His right of control over the possession of all, with the right of selection, would be invaded if a stranger could come in and slay goats at will. "Replevin is based on the supposition that plaintiff has a general or special property in the goods in dispute and a right to their immediate possession, and that defendant stands in the way of the exercise of this right." (Cobbey on Replevin, sec. 18.)

It certainly cannot be claimed that defendants could go upon that island and kill eight thousand goats and carry away their skins (as it appears was done) without materially disturbing plaintiff's right of possession and selection. While trespass would lie, we do not think plaintiff is confined to that remedy. The lease carried with it the goats on the island; they were a part of the leased property, and their utilization formed part of the

consideration for which rental was paid; the case would not be different if the animals had been cattle. Being part of the leased property, plaintiff had his action against anyone, even the lessor, who might take it out of his possession wrongfully. (Cobbey on Replevin, secs. 52-54.) Where plaintiff had a right to the use of property at will, he had a right to replevy it from a wrongdoer. (*Tandler v. Saunders*, 56 Mich. 142.) Where plaintiff had purchased five hundred head of cattle, part of a herd of several thousand, it was said by this court that replevin would lie against the owner of the herd for the purpose of enabling the vendee to select his five hundred, and that our action of claim and delivery is at least commensurate with the action of detinue at common law. (*McLaughlin v. Piatti*, 27 Cal. 452.) The opinion in *Kellogg v. King*, *supra*, is instructive on the point as to the rights of plaintiff.

4. The judgment is claimed to be erroneous in that it allowed one dollar as damages for the detention of the property and also allowed interest on the value of the property from the date of the taking. This was error. (Code Civ. Proc., sec. 667.) If interest from the time of the taking can be allowed, which we do not decide, it cannot be allowed except as damages for the detention, and in the present case that damage was fixed at one dollar. The view taken of the case in this opinion makes it unnecessary to point out the specific findings which are not justified by the evidence.

The judgment and order appealed from should be reversed and a new trial granted.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial granted.

Garoutte, J., Harrison, J., McFarland, J.

[Crim. No. 232. In Bank.—December 16, 1897.]

THE PEOPLE, Respondent, v. B. W. VAN HORN et al., Appellants.

CRIMINAL LAW—PRELIMINARY EXAMINATION—POSTPONEMENT WITHOUT CONSENT OF DEFENDANT — JURISDICTION TO COMMIT.—Any error committed in the postponement of a preliminary examination, on motion of the prosecution, for more than six days, without the consent of the defendant, in violation of section 861 of the Penal Code, in order to secure the attendance of witnesses for the prosecution, who appeared and testified at the adjourned examination, does not affect the jurisdiction of the magistrate to commit the defendant upon probable cause shown therefor.

ID.—MOTION TO SET ASIDE INFORMATION—ERROR NOT REVIEWABLE.—A motion to set aside an information on the ground that the defendant had not been legally committed by a magistrate, is not in the nature of an appeal from the order of commitment by the magistrate; and mere errors alleged to have occurred at the preliminary examination cannot be reviewed on such motion.

ID.—APPEAL—DEFECT IN PRELIMINARY EXAMINATION—SUBSTANTIAL RIGHT.—A defendant, who has been convicted by a jury in the superior court after a fair trial upon an information, cannot avoid the verdict for any reason founded on an alleged defect in the preliminary examination and commitment, unless by such defect he was deprived of some substantial right.

ID. — CONSTRUCTION OF CODE — TEMPORARY ILLEGAL CONFINEMENT — FAILURE TO USE REMEDY—ABSENCE OF LEGAL PREJUDICE.—Section 861 of the Penal Code is intended to protect a party from loss of liberty for an unreasonable time under the pretext of a criminal charge against him; and if the defendant should be freed from custody because held without his consent more than six days before preliminary examination, he could be rearrested upon another complaint, and if he remained in temporary illegal confinement, without using any remedy therefor, the mere postponement of the hearing does not affect the jurisdiction of the magistrate to hold a preliminary examination of the defendant then in custody, and if the examination then proceeded to a commitment based on probable cause, the defendant has suffered no material prejudice in the matter of the commitment, and has suffered no legal prejudice because at the time to which the examination was continued witnesses for the prosecution, whose attendance could not be procured within the six days, appeared and testified.

ID.—HOMICIDE—ARREST OF DECEASED—DEATH FROM HOSTILE MOB—EVIDENCE—ANTICIPATION OF DEFENSE.—Where it appeared that defendants accused of murder had arrested the deceased upon a charge of murder, and that deceased was shot and hung upon a

mountain trail in a sparsely settled country, and that the defendants relied upon the defense that the deceased had been taken from their custody and killed by a hostile mob, and there was ample evidence to warrant the jury in finding the defendants guilty of the killing, unless it was done by a mob as claimed by them, it was not error to permit the prosecution to anticipate the declared defense by calling a number of persons who lived within several miles of the place of the homicide as witnesses, to prove their absence at the time of the killing, and that there could not have been a mob on the trail where the killing was done.

ID.—TESTIMONY AS TO CONSPIRACY AND ACTS OF CONSPIRATORS—DECLARATIONS OF THIRD PERSON SHOT—ORDER OF EVIDENCE—INNOCENCE OF DECEASED.—Where there was evidence tending to show a prima facie case of conspiracy between the defendants and a few other persons, and that the homicide was the result of such conspiracy, the order in which the evidence as to the conspiracy and the acts of the conspirators should be proved was in the discretion of the court; and when the subsequent acts of the alleged conspirators made the statements of the person alleged to have been shot by the deceased admissible, the order in which such evidence was received was immaterial; and it was permissible to permit the prosecution to show that such person made differing statements, and to offer evidence tending to show that the deceased did not shoot such person.

ID.—LETTER FOUND UPON PERSON SHOT—IMMATERIAL EVIDENCE—REFUSAL TO PERMIT STATEMENT OF CONTENTS—HARMLESS RULING.—The address and contents of a letter found upon the person alleged to have been shot by deceased, and which was buried with his body, are immaterial, and could not be pertinent to the guilt or innocence of the defendants; and it cannot be prejudicial or reversible error for the court to refuse to permit defendants to state the contents of such letter in their offer of proof.

ID.—IMPANELING JURY—ILLNESS AND DISCHARGE OF JUROR—SELECTION OF NEW JUROR.—Under section 1123 of the Penal Code, a juror may be discharged on account of sickness after the jury has been impaneled and before the introduction of evidence; and another juror may then be regularly drawn, examined, accepted, and sworn.

ID.—INSTRUCTION—MODIFICATION—VERBAL ADMISSIONS OF PARTY—CAUTION—PROVINCE OF JURY—REVIEW UPON APPEAL.—An instruction requested by the defendants to the effect that the verbal admissions of a party should be received "with great caution" is properly modified by striking out the word "great"; and where such requested instruction contained matter of encroachment upon the province of the jury, for which it might have been refused, defendants cannot complain upon appeal of error of the court in giving it.

ID.—INSTRUCTIONS ALREADY GIVEN—INAPPLICABLE INSTRUCTIONS.—Instructions requested upon the subject of reasonable doubt, upon which the court had already fully instructed the jury, and instructions requested as to disregarding statements of the prosecuting attorney of facts not proved, not called for by anything appearing in the record, are properly refused.

ID.—NEW TRIAL—DRINKING OF LIQUOR BY JURORS—REQUEST OF SHERIFF—TRIVIAL OCCURRENCE.—The mere casual drinking of a small quantity of liquor by some of the jurors just before supper, at request of the sheriff, and after one of the jurors had invited another to take a drink, where it appears that no one of them was intoxicated, or affected in any way by what they drank, is too trivial an occurrence to constitute ground for a new trial.

APPEAL from a judgment of the Superior Court of Trinity County and from an order denying a new trial. John F. Ellison, Judge.

The facts are stated in the opinion of the court.

Oregon Sanders, D. G. Reid, and H. R. Given, for Appellants.

W. F. Fitzgerald, Attorney General, and C. N. Post, Deputy Attorney General, for Respondent.

McFARLAND, J.—The defendants, Van Horn and Crow were charged by information with the murder of one A. D. Littlefield. They were convicted of murder in the second degree and sentenced to imprisonment in the state's prison; and they appeal from the judgment and from an order denying a new trial.

The transcript is quite voluminous, and appellants make a great many points upon exceptions taken by them to rulings of the court below upon the admissibility of evidence and to instructions given and refused. We do not think that any of these points are very important or show reversible error. Some of them will be noted hereafter.

The most serious point made by appellants arises upon the denial of the court to grant their motion to set aside the information, the motion being upon the ground "that before the filing thereof the defendants had not been legally committed by a magistrate," as provided in subdivision 4 of section 995 of the Penal Code. The specific facts relied on by appellants are, that at the preliminary examination the committing magistrate, upon affidavit of the prosecuting officer showing the absence of material witnesses for the prosecution, postponed the hearing for a period of more than six days without the consent of the appellants. Appellants contend that this was in violation of section 861 of

the Penal Code, which provides as follows: "The examination must be completed at one session, unless the magistrate, for good cause shown by affidavit, postpone it. The postponement cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of the defendant"; and the contention is, that for this reason the defendants were not "legally committed by a magistrate." It is not denied that in other respects the preliminary examination was regularly had and that the order of commitment was properly made. It is true that appellants contend, in connection with this point, that the affidavit made for the continuance was not sufficient; but it is quite evident that a motion to set aside an information is not in the nature of an appeal from the order of commitment made by the magistrate, and that mere errors alleged to have occurred during the preliminary examination cannot be reviewed on such motion.

The commitment by a magistrate after examination of a person charged with a crime will support an information where the magistrate had jurisdiction to make the commitment, and there was no irregularity affecting defendants' substantial rights; and we do not think that a postponement of the preliminary examination beyond six days, whether erroneous or not, affected the jurisdiction. If the postponement worked appellants any legal wrong, such wrong consisted in their temporary illegal confinement by the officer who had them in custody, for which, if not lawful, there would have been a remedy at the time. If they could have been freed from custody, and had procured that result, they, of course, could have been rearrested upon another complaint; but as the examination upon the original complaint proceeded to completion, and was followed by a commitment in due form, the mere postponement of the hearing complained of did not destroy the jurisdiction. A party who has been convicted by a jury in the superior court, after a fair trial, upon an information, cannot avoid the verdict for any reason founded on an alleged defect in the preliminary examination and commitment, unless by such defect he was deprived of some substantial right. Section 861 is evidently intended to protect a party from loss of liberty for an unreasonable time under the pretext of a criminal charge against him; but when, as in the case at bar, he

remains in custody for a short period after the six days, and the examination then proceeds to a commitment which is based on probable cause, it cannot be said that he has suffered any material prejudice in the matter of the commitment. Certainly, he did not suffer legal prejudice because at the time to which the examination had been continued the necessary witnesses for the prosecution, whose presence could not have been procured within the six days, appeared and testified.

We will notice of the other numerous points made by appellants those which we deem of importance, and, in order the better to do so, we will state briefly the main facts in the case.

On the afternoon of the twenty-seventh day of September, 1895, the appellants, Van Horn and Crow, the former being a constable, arrested the deceased, Littlefield, upon the charge of having shot one Vinton on the 25th of the same month. The arrest was made at Eel river, on or near the trail which runs from the river through a mountainous and sparsely settled country, near the boundary line between the counties of Mendocino and Trinity, up over Wylackie Hill and Red Mountain, past what is known as the Red Mountain House, and thus on to Weaverville, the county seat of Trinity county. About four or five miles from the river there is what is known as "the forks of the trail"—one branch going to the Red Mountain House and the other to the house of one Thomas Hayden. When Littlefield was arrested he was engaged with two companions in herding cattle, and was at the time resting near the trail. The defendants disarmed him and started with him up the trail, riding single file, Van Horn being first, Littlefield next, and Crow behind. The defendants were both armed. They were going in this position when last seen by Littlefield's companions, and were shortly afterward seen in the same position by another witness. About sundown two persons, Walter Clark and George Block, who were then at or near the Red Mountain House, which is about two or two and a half miles from said forks, heard three shots from the direction of the forks. About twenty minutes or half an hour afterward the defendants rode up to where Clark and Block were and told them that a mob had taken Littlefield away from them and killed him. Crow said that there were about twenty men in the mob and about twenty shots fired, and Van Horn said

that there were about a dozen men and about a dozen shots fired. Clark suggested going back to see if anything could be done for Littlefield, but defendants said that nothing could be done as Littlefield was dead. The defendants then went on to the house of a brother of the defendant Van Horn, which is several miles beyond the Red Mountain House. On the morning of the next day the dead body of Littlefield, with three bullet holes in it, was found at or near said forks. The body was suspended by a rope to the limbs of a tree, the feet being within a few inches of the ground.

The above facts are not denied by the appellants, except only the hearing of three shots by Clark and Block. The defense was, that Littlefield was forcibly taken away from them and killed by a hostile mob; and it may be remarked here that there was ample evidence to warrant the jury in finding the defendants guilty, unless the killing was done by a mob as claimed by appellants. And so the whole case revolves around the question, whether or not there was such a mob, who, against the will of the defendants, took Littlefield away from them and killed him.

One of the main points made by the appellants in the matter of the admissibility of evidence is founded upon exceptions to the rulings of the court allowing the prosecution to prove the whereabouts of a number of persons on the day of the homicide. The country thereabouts was sparsely settled, and the prosecution called a number of persons as witnesses who lived within several miles of the scene of the homicide, and had them testify that on the afternoon of the 27th they were not near the place where Littlefield was killed. This was for the purpose of showing that there could not have been a number of persons present on said trail, as asserted by appellants—an attempt to prove a sort of an *alibi* for the mob. This was an effort on the part of the prosecution to anticipate the defense, which was perhaps unnecessary. If it had been offered in rebuttal there could have been no plausible objection to it, but, as the testimony was relevant to the main issue in the case, we see no ground upon which it could be held inadmissible because offered in anticipation of the defense which appellant's declarations showed they intended to make. Therefore, we do not think that the court erred in admitting such testimony.

Certain other points of appellants are founded upon exceptions to rulings of the court allowing what is claimed to be inadmissible evidence to prove a conspiracy. It seems from the arguments of counsel here that the prosecution, in addition to resting upon the main facts above stated, had a theory that the killing of Littlefield, either by the appellants themselves or with the aid of others acting in conjunction with them, was the result of a conspiracy between the appellants and a few other persons. The appellants, previous to the arrest of Littlefield, started for the purpose of making the arrest from the house of a man named Thomas Hayden, who lived a short distance from said trail. When they started from Hayden's house there were with them five other men, viz., Thomas Hayden, Buck Laicock, Joseph Gregory, Fred Radcliff, and Gordon Van Horn, all mounted and armed. The prosecution put nearly all of said five other men on the stand, and they testified that they went to a place not very far from said trail, where Vinton had said that Littlefield had shot him a day or two before, for the purpose of examining tracks, etc., about said place. They testified that before they reached the place where they intended to make such examination the appellants, Van Horn and Crow, left them and went down toward the place where the latter afterward arrested Littlefield, and that they were not present at the place where Littlefield was afterward killed, and knew nothing about that transaction. There was certainly nothing in this testimony that was objectionable. Upon its face it did not differ from the said testimony of other witnesses showing the whereabouts of different persons on that day. If, however, it be assumed that the prosecution was intending to prove a conspiracy between these five persons and the appellants, and also said Vinton we do not see that any of the evidence admitted by the court was under that view, inadmissible. The theory of the prosecution in this regard, if there was any theory as to a conspiracy, seems to have been that Vinton was not shot by Littlefield and that his assertion that Littlefield shot him was a mere pretense which would give the conspirators the color of right to arrest Littlefield, and to claim that he was killed while arrested by a supposed mob. It was proved by the prosecution that Vinton sent for at least some of the alleged conspirators to come to the house of Hayden, where Vinton was and it was

proven that on the day of the homicide and on the day previous thereto all these persons, supposed to be conspirators, did assemble at the house of Hayden; and that all of them except Vinton, who was unable to go, did leave the house of Hayden together, all armed, on the afternoon of the 27th, and did go in the direction of the trail upon which Littlefield was killed. The general objection is made here, as it is generally made in a defense against an alleged conspiracy, that declarations of the alleged conspirators were improperly allowed against the defendants before there was any sufficient proof of the conspiracy itself. But we do not see how any such objections are available here. In the first place, the order in which evidence as to a conspiracy shall be received is very much in the discretion of the court; and, in the second place, we do not see in this case where any declarations of one alleged conspirator charging or implicating other conspirators were introduced. If there was any conspiracy proved in this case it was proved by the combined acts of the conspirators. These persons assembled at the house of Hayden, where Vinton was stopping; it is apparent that they knew that Vinton had accused Littlefield of shooting him, and that Littlefield was to be arrested; and an hour or two before Littlefield was killed they all, except Vinton, went together in the direction of the place of the homicide; and these facts, with others not necessary to be here mentioned, were sufficient to go to the jury as evidence strongly tending to show a *prima facie* case of conspiracy. The contention that the declarations of one alleged conspirator against the others were improperly admitted can apply, as against these defendants only, so far as we have observed to the admission of statements by Vinton to the others that Littlefield had shot him; but how could this have prejudiced appellants when they admit that they arrested Littlefield for his alleged attack on Vinton? There was no pretense of any other cause for the arrest. Moreover, the subsequent acts of the alleged conspirators made the said statements of Vinton clearly admissible; and, this being so the order in which the evidence was introduced was immaterial. (*People v. Fehrenbach*, 102 Cal. 396, 397; *People v. Daniels*, 105 Cal. 264.) An in this connection we may here say that we see no error in allowing testimony to the effect that Vinton said shortly after he was shot that he did not know who shot him. (Vinton appeared

at the house of Hayden on September 25th suffering from a severe gunshot wound. He said that he was shot at a certain place about a mile from Hayden's house by a masked man, whom he claimed to identify as Littlefield. The prosecution seems to claim that he shot himself accidentally.) Neither do we see any error in allowing testimony as to the whereabouts of Littlefield on the 25th; it tended to show that he did not shoot Vinton, and thus to support the prosecution's theory of a conspiracy.

On the cross-examination of a witness for the prosecution who had been at the inquest held over the dead body of Littlefield, he testified that he had found a letter on the person of deceased; that he had read it and had returned it; and that it had been buried with the body. The appellants then asked the witness: "Who was the letter from, and to whom?" An objection to the question by the prosecution was sustained. Appellants then offered to prove the contents of the letter, and their offer was denied, and the court declined, as we understand the record, to allow appellants' counsel to state what they proposed to prove as such contents. These rulings are contended by appellants to be reversible errors. But we cannot imagine how any possible contents of the letter would have constituted evidence favorable to appellants as to any of the issues in the case; and counsel have not suggested any plausible reason why such contents—attributing to them any character which counsel might choose to name—would have been material or pertinent evidence in the case. We do not think, therefore, that said rulings were erroneous or prejudicial to appellants.

There are a number of other exceptions to rulings about the admissibility of evidence, and it would take a great deal of time and space to enumerate and specially notice each of them; and this we deem it unnecessary to do. It is sufficient to say that most of such rulings were clearly right, and that those about which there could be any question concern matters of too little importance to warrant a new trial under any view that could be taken of their correctness. As hereinbefore stated, the pivotal question in the case was whether or not the deceased was actually and forcibly taken away from appellants against their will by a mob who killed him; and we think that this question was fairly presented to the jury. Perhaps the prosecution undertook to

prove more than it was called upon to prove, but we do not see that the rights of the appellants were in any way thereby prejudiced.

After the jury had been impaneled to try the case, and before the introduction of evidence, one of the jurors became sick and the court discharged him. To this discharge appellants excepted. Another juror was then regularly drawn, examined, accepted, and sworn. It is now contended that this proceeding was unwarranted and vitiates the judgment. The contention is not maintainable. Section 1123 of the Penal Code justifies the course pursued by the court. (*People v. Brady*, 72 Cal. 490.)

It is contended that the court erred in modifying instruction XXX asked by appellants. This instruction is somewhat lengthy, and refers to the general subject of the caution with which evidence of the verbal admissions of a party should be received. It contained matter which made it under the opinion in *Kauffman v. Maier*, 94 Cal. 282, an encroachment upon the province of the jury and might have been refused for that reason. It was given, however, at appellants' request, and they cannot complain. The modification complained of was this: in the instruction, as proposed by appellants' counsel, it was stated that the verbal admissions of a party should be received with "great caution," and the court merely struck out the word "great." No other modification was made. This was certainly not error. The code provision on the subject (Code Civ. Proc., sec. 2061) does not use the word "great" before "caution," and the instruction thus modified stated fully as much as appellants were entitled to have given. Counsel also say: "The court erred in refusing to give instructions asked by defendants (see Trans., pp. 80, 81)." Upon referring to those pages we find that they contain offered instructions upon the subject of reasonable doubt. They were properly refused because the court had already charged the jury fully upon that subject. We do not think that the court erred in refusing the offered instruction on page 82 of the transcript to the effect that the jury should disregard statements of the prosecuting attorneys of facts not proven. It was not called for by anything appearing in the record. We do not observe in appellants' brief any other objection touching the matter of the giving or refusing instructions.

We see nothing in the point that a new trial should be granted because on one occasion some of the jurors took a drink of whiskey. It appears that while the jurors were at a hotel under the charge of the sheriff and were washing and preparing to take supper, one of them stepped up to the bar which was in the hotel and asked another juror to take a drink with him, whereupon the sheriff asked all the jurors to take a drink before going in to supper. The jurors all went to the bar; some of them took whiskey, in quantity about "two tablespoons"; some of them took cigars, and one took mineral water. It abundantly appears that no one of them was intoxicated "or affected in any way" by what they there drank. To set aside a verdict on account of these facts would be preposterous. (*People v. Leary*, 105 Cal. 502; *People v. Sansome*, 98 Cal. 239.) The invitation to drink given by the sheriff was evidently suggested at the moment by the invitation which one juror had given to another, and therefore there is little force in the intimation that it was a predetermined attempt by the sheriff, who is asserted to have been unfriendly to appellants, to influence the jury—if it were conceivable that a jury could be thus influenced in so grave a matter. It is apparent that if verdicts could be upset by such trivial occurrences it would be easy to bring about such occurrences for the purpose of upsetting verdicts.

We observe no other points calling for special notice.

The judgment and order appealed from are affirmed.

Henshaw, J., Garoutte, J., Harrison, J., and Temple, J., concurred.

Rehearing denied.

[S. F. No. 755. Department Two.—December 17, 1897.]

**SAMUEL G. MURPHY, Respondent, v. PACIFIC BANK,
Appellant.**

SAVINGS BANK—CHARTER—AMENDMENTS—COMMERCIAL BUSINESS—

DEPOSITORS NOT STOCKHOLDERS PREFERRED—BY-LAWS.—A savings bank organized under the banking act of 1862, which had the required capital stock contemplated by the amendments of 1864, was authorized by those amendments to engage in commercial business; but the original act as thus amended constituted its charter, and, in the absence of the adoption of a by-law, authorized thereby, extending the same security to depositors who were stockholders as to other depositors, the provisions of the act giving depositors who were not stockholders a prior claim upon the assets applies to savings banks who were doing a commercial business; and it was competent for its stockholders, either by acquiescence in the terms of the statute or by an express provision in its by-laws, to assure such preference to nonstockholding creditors.

ID.—LIABILITY OF STOCKHOLDERS—UNCONSTITUTIONAL EXEMPTION—INDEPENDENT PROVISION.—The unconstitutional exemption of stockholders of savings banks from liability under the act of 1862, was an independent provision, and did not affect or annul the provision declaring a preference in favor of nonstockholding creditors in the distribution of the assets.

ID.—CERTIFICATE OF DEPOSIT TO STOCKHOLDER.—The fact that a certificate of deposit was issued to a stockholder of a savings bank doing a commercial business, does not determine the character of the business transacted by the bank. Such certificates are usual with commercial banks, and, under section 576 of the Civil Code, may be issued by savings and loan corporations.

ID.—CONSTITUTIONAL LAW—FORMATION OF CORPORATIONS UNDER GENERAL LAWS—CHANGE OF LEGISLATION AS TO SAVINGS BANKS.—The fact that the act of 1853 for the incorporation of savings banks did not postpone the claims of depositors who were stockholders, as was provided in the subsequent act of 1862, does not render the latter act unconstitutional, and its general and uniform operation is not affected because it authorizes corporations to adopt or reject the provision for such postponement.

ID.—PARTIAL REPEAL OF PRIOR INCORPORATION ACT—EFFECT OF CODE.—The act of 1862 was so far repealed by section 288 of the Civil Code that no new corporations could be formed under that act; but it remained in force so far as corporations theretofore formed were concerned, not only to sustain their existence, but also to fix their character, and define their powers, duties, obligations, and liabilities, except so far as modified by inconsistent code provisions relating to such corporations, unless they should elect to come under the code provisions.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion.

Sawyer & Burnett, for Appellant.

H. A. Powell, and W. A. Dow, *Amici Curiae*, representing certain Depositors of Appellant.

Roger Johnson, for Respondent.

HAYNES, C.—The defendant, a banking corporation, closed its doors on June 23, 1893, being then insolvent, and on November 3, 1893, was duly declared insolvent in a proceeding taken under section 11 of the bank commissioners' act, and since that time has been in liquidation, and has declared and paid six dividends of five per cent each on the unsecured claims of its depositors and creditors, exclusive of creditors who are stockholders, and future dividends amounting to ten or fifteen per cent are expected to be paid.

This action was brought to recover a judgment against the defendant for the sum of \$73,928.10, in which sum, the plaintiff alleged the defendant became indebted to James M. McDonald on March 23, 1893, for moneys theretofore loaned to it by said McDonald, who at all said times was and still is a stockholder; that said demand is unsecured and that said McDonald sold and assigned said demand to the plaintiff in good faith and for value. The prayer was for judgment in said sum, that he be paid thirty per cent thereof, the amount of dividends already paid to others, and be allowed to participate in all future dividends.

The defendant, in its first defense, denied that said money was loaned to the bank, and alleged that on February 25, 1893, McDonald had on deposit with defendant \$125,000 as a deposit, and not otherwise; that for said sum a certificate of deposit was then issued; that on March 23, 1893, defendant paid McDonald \$50,000, and gave a new certificate for \$75,000, upon which there remains unpaid the sum named in the complaint.

For a second answer, it was alleged that defendant was incorporated under "An act to provide for the formation of corporations for the accumulation and investment of funds and savings,"

approved April 11, 1862, and a copy of its articles of incorporation is attached as an exhibit, the corporate name being "Pacific Accumulation and Loan Company"; that in March, 1866, an act was passed authorizing said corporation to change its name to that of "Pacific Bank," and said act and the certificate of said change of name is also set out as an exhibit; that from that time its business has been conducted under the name of the Pacific Bank; that plaintiff's assignor, James M. McDonald, for ten years or more last past owned, and there is still standing in his name, 1,738 shares of the capital stock of said bank, upon which he drew dividends up to January 1, 1893; that by said act of April 11, 1862, the capital stock and assets of the corporation were made a security to depositors who are not stockholders, and that the by-laws of defendant did not at any time provide that said security should extend to deposits made by stockholders; that said plaintiff took said assignment long after and with full knowledge of defendant's insolvency, and has no right to maintain this action for dividends.

To this answer the plaintiff demurred, the demurrer was sustained and judgment entered for the plaintiff as prayed for, and defendant appeals.

It is not contended that the plaintiff, as the assignee of McDonald, who is a stockholder in said bank, is in any better situation than his assignor would have been; and therefore, for convenience, we will consider the plaintiff as a stockholder.

The plaintiff alleges in his complaint that for twenty years or more the defendant was engaged in the transaction of a general commercial banking business exclusively. This allegation is not denied, but the defendant contends that the powers, duties, and liabilities of the corporation, and the rights of creditors who are not stockholders, and of those who are, must be determined by the statute and the articles of incorporation; that if these give a preference to creditors who are not stockholders, that it is not in the power of the stockholders or the corporation to change or affect these relative rights by doing a business not authorized by the statute or the articles of incorporation; whilst, on the other hand, it is contended that being *de facto* a commercial bank the defendant is estopped from claiming to be a savings bank. Other contentions will be noticed as we proceed.

That part of section 10 of the act of 1862 (Stats. 1862, p. 201), material to the present controversy, is as follows: "And it shall not be lawful for the corporation or the directors to contract any debt or liability against the corporation for any purpose whatever, but the capital stock and the assets of the corporation shall be a security to depositors who are not stockholders, and the by-laws may provide that the same security shall extend to deposits made by stockholders."

It is alleged in the answer that no by-law was ever passed giving such security to stockholders for their deposits, and this is admitted by the demurrer.

The certificate of incorporation recited that the corporation was formed under the provisions of said act of 1862, and in the name of the "Pacific Accumulation Loan Company," and "that the object for which it is formed is that of aggregating the funds of the members of said corporation and others, and preserving and safely investing the same for their common benefit in loans on real estate, mining claims, mining and other securities, public and private, in the manner, on such terms, at such rates of interest, and for such further consideration as may be determined from time to time by the board of directors."

The act of March 31, 1866 (Stats. 1865-66, p. 620), authorizing the name of the corporation to be changed to "Pacific Bank," did not confer any special powers or privilege—except to change its name—but expressly provided that it shall "enjoy all the corporate rights, powers, and privileges enjoyed heretofore and now under the laws of this state, and shall be subject to all the corporate obligations and responsibilities created by their said act of incorporation, or existing under the name of said Pacific Accumulation Loan Company."

The change of name, therefore, did not relieve the corporation from any of the provisions of the act of 1862; but the question is, whether the change in the character of its business has relieved the incorporators from that provision of the act which gave nonstockholding creditors a preference in the distribution of its assets.

The question whether the Pacific Bank should be held to be a savings bank or a commercial bank has been raised in at least two former cases, in each of which it was left undecided for the

reason that its decision was not necessary to the decision of those cases. (*Crane v. Pacific Bank*, 106 Cal. 68; *McGowan v. McDonald*, 111 Cal. 57; 52 Am. St. Rep. 149.)

Nor do I think it necessary in this case to decide that question upon the facts assumed by counsel, viz., that the statute of 1862, under which the corporation was formed and existed, did not authorize the transaction of any other business than that of a savings bank.

In neither of the cases above mentioned, nor in this case, have counsel referred to the important amendments of said act of 1862 made by the act of March 12, 1864 (Stats. 1863-64, p. 158), and hence we are without the benefit of their views as to the scope and effect of the amendatory act.

The changes in the statute material to be noticed are the following:

Section 4 of the original act, in defining the powers of banks organized thereunder, provided, by the fifth subdivision, as follows: "5. To loan and invest the funds of the corporation, to receive deposits of money, and to loan and invest the same, to collect the same with interest, and to repay such deposits with so much of the earnings and interest as the by-laws may provide."

This subdivision was amended by inserting after the word "deposits," where last used, the words "without interest, or;" thus making it read: "And to repay such deposits without interest, or with so much of the earnings and interest as the by-laws of the corporation may provide."

Section 5 of the original act was as follows: "No corporation formed under this act shall loan any money without adequate security on real and personal property, and no deposits shall be loaned or invested for a period exceeding six years."

The section as amended reads:

"Sec. 5. No corporation formed under this act shall loan any money without adequate security on real and personal property except when any such corporation shall, by a by-law to that effect, adopted by a two-thirds vote of all the stock of the company subscribed and taken, authorize the making of loans to persons of reputed solvency, when ordered by a vote of not less than three-fourths of all the directors thereof; provided, that this exception shall apply only to corporations having a capital stock

or reserved fund, or both capital stock and reserved fund, paid in, of not less than three hundred thousand dollars; and no deposits shall be loaned or invested for a period exceeding six years."

The third subdivision of section 13 of the original act provided, among other things, that "said corporation shall not, directly or indirectly, deal or trade in buying or selling any goods, wares, or merchandise whatever, except such personal property as may be requisite for its immediate accommodation for the convenient transaction of its business, and except gold and silver bullion and United States mint certificates of ascertained value and evidences of debt issued by the United States government."

The section as amended, after the words "for the convenient transaction of its business," added, "and except bonds, securities, or evidences of indebtedness, public or private, gold and silver bullion," etc., and added the proviso that it should apply only to corporations having a capital stock or reserved fund, or both.

The first of these amendments was intended to permit ordinary deposit accounts payable upon demand without interest; the amendment to section 5 authorized the adoption of a by-law under which loans might be made to persons of reputed solvency, without security on real or personal property, and the amendment to section 13, subdivision 3, authorized the corporation to deal in bonds, securities, or evidences of indebtedness, public or private; and these include all kinds of commercial paper and securities.

Whether these amendments, passed in 1864, had anything to do with the change of the name of the bank authorized by the next legislature we need not inquire; but I think it clear that these amendments authorized the bank to continue its existence as a savings bank; or to do a commercial business, or to conduct both under the management of the same board of directors. This bank had the required capital stock, and was therefore within the amendments of 1864. But, though it availed itself of these amendments and from that time on conducted only the business usually conducted by a commercial bank, the act as thus amended was its charter, and defined for the whole period

of its subsequent existence the terms and conditions constituting its relationship and liability to depositors, unless changed by subsequent legislation, and that provision of the act giving depositors who are not stockholders a prior claim upon the assets over depositors who are, not having been stricken out or repealed, is thus made applicable to banks organized under it and doing business as commercial banks; and as that act gave the corporation the option of extending the same security to depositors who were also stockholders, by the simple adoption of a by-law, their failure to adopt such by-law was well nigh equivalent to an express agreement that its stockholders would yield to other depositors the preference named in the statute; and as there is no provision of the constitution, or of the code or other statute, prohibiting it, it is competent for the stockholders, either by acquiescence in the terms of the statute under which the corporation is formed, or by an express provision in its by-laws, to assure to nonstockholding creditors the preference here in question.

It is said, however, that "if the rights of the parties are to be determined by section 10 of the act of 1862, then McDonald is not only personally liable as a stockholder for his proportion of all the debts and liabilities of the bank, but he is to be excluded as a depositor from any share in the dividends declared by the board of directors."

It is sufficient to say that the personal liability of stockholders in this and all other corporations existed at and before the time the act of 1862 was passed; but the legislature saw fit, notwithstanding that liability, to declare a preference in favor of nonstockholding creditors in the distribution of the assets. It is true that the legislature undertook, by section 27 of said act, to relieve stockholders in corporations formed under it from personal liability, but that section violated section 36 of article IV of the constitution of 1849, which imposed such personal liability (*McGowan v. McDonald*, 111 Cal. 57; 52 Am. St. Rep. 149); but it was further held that said section was an independent provision, and that its unconstitutionality did not affect the other provisions of the act.

It is alleged in the answer that the claim of the plaintiff is based upon a certificate of deposit; but that does not determine

the character of the business transacted by the bank. Such certificates are usual with commercial banks, and under the provisions of section 576 of the Civil Code may be issued by savings and loan corporations.

It is further contended by respondent that the act of 1862 is unconstitutional; that the act of 1853 providing for the incorporation of savings banks, did not postpone the claims of depositors who were stockholders as provided in the act of 1862; that hence there were two classes of savings banks, and that this condition of things is obnoxious to the constitutional provision that "all laws of a general nature shall have a uniform operation." But the constitution of 1849 also provided that corporations may be formed under general laws, and that such general laws may be altered from time to time or repealed (Const., art. IV, sec. 31); and the later act declared that all acts and parts of acts in conflict with it "are hereby declared to be inoperative." But this provision of the act of 1862 was not inconsistent with the act of 1853. It gave savings banks the option of giving their depositors greater security for their deposits, thus strengthening the credit of the banks and promoting their business. The general and uniform operation of a statute is not affected because it authorizes corporations to adopt or reject a particular provision. The Civil Code authorizing the incorporation of savings banks authorizes them to be formed upon either of two radically different plans, viz., with or without a capital stock. (*Los Angeles v. State Loan etc. Co.*, 109 Cal. 396.) The general operation of the statute is not affected if it gives to all corporations of its kind or class the opportunity of adopting either the one or the other of two different provisions if neither conflicts with the constitution.

It is further contended by respondent that the act of 1862 was repealed by section 288 of the Civil Code.

That said act was repealed so far that new corporations could not be found under it there is no doubt; but, so far as corporations theretofore formed under it were concerned, it remained in force, not only so far as might be necessary to sustain their existence as corporations, but to fix their character, define their powers, duties, obligations, and liabilities, except in so far as these were modified, altered, or repealed by inconsistent code provisions relating to such corporations.

Said section provides: "No corporation formed or existing before 12 o'clock noon of the day upon which this code takes effect is affected by the provisions of part IV of division 1 of this code, unless such corporation elects to continue its existence under it as provided in section 287; but the laws under which such corporations were formed and exist are applicable to all such corporations and are repealed subject to the provisions of this section."

Section 287 of the Civil Code above referred to, after providing for the manner in which pre-existing corporations may make and certify their election to continue their existence under the code, provides: "And thereafter the corporation shall continue its existence under the provisions of this code which are applicable thereto, and shall possess all the rights and powers and be subject to all the obligations, restrictions, and limitations prescribed thereby."

It will be observed that as to corporations existing at the time the code took effect and which elect to continue their existence under it, "the provisions of the code which are applicable thereto" govern them, and that they "possess all the rights and powers" and are "subject to all the obligations, restrictions, and limitations prescribed thereby," and that corporations which do not so elect are not "affected by the provisions of part IV of division 1, . . . but the laws under which such corporations were formed and exist are applicable to all such corporations."

The distinction here made between those corporations which should elect to come under the code provisions and those that did not is clearly manifest. If no such distinction was intended, it would have been quite sufficient to say that no corporation shall cease to exist because of the adoption of the code, but thereafter all corporations existing at the time the code takes effect shall be governed by its provisions alone; and there would have been, in that case, no necessity or propriety for an election on the part of the corporation to come under its provisions. This construction is supported by *Robinson v. Southern Pac. Co.*, 105 Cal. 549, 550, though the question was not fully considered.

Respondent cites the case of *Market Street Ry. Co. v. Hellman*, 109 Cal. 571, which appears to give a different construction to said section 288 of the Civil Code. The question here involved, however, was not necessary to a decision of that case. There

several street railway corporations were consolidated, one of which was in existence before the code went into operation, and the question was as to the action of that corporation in effecting the consolidation, which was made under the provisions of the Civil Code. As will be seen by reference to page 584 of the report, the statute of 1861 contained substantially the same provisions in relation to consolidation as section 473 of the Civil Code, and therefore it was immaterial whether the power of that corporation to make the consolidation was under the code or under the prior statute.

Here the conditions are slightly different. The provisions in the act of 1862 giving a preference to nonstockholding creditors is re-enacted in section 573 of the Civil Code in substantially the same language, under the title relating to "savings and loan corporations." If, therefore, the Pacific Bank is regarded as a savings bank, the question whether the old statute is preserved or not is clearly immaterial; but if it be regarded as a commercial bank the provision in question does not exist if it be true that the code absolutely and unconditionally repeals all former statutes under which it existed except so far as was necessary to mere corporate existence.

I think the court below erred in sustaining the demurrer, and that the judgment should be reversed, with directions to overrule it.

Chipman, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed, with directions to overrule the demurrer.

Garoutte, J., Harrison, J., McFarland, J.

Hearing in Bank denied.

[L. A. No. 349. Department Two.—December 17, 1897.]

NATHAN GOLDTREE et al., Appellants, v. JANE ALLISON et al., Respondents.

TRUST UNDER WILL—ESTATES OF DECEASED PERSONS—DECREE OF DISTRIBUTION TO TRUSTEES—DETERMINATION OF VALIDITY OF TRUST—RES ADJUDICATA—CREDITOR'S BILL.—Where the estate of a deceased person is distributed to the trustees appointed under the will, the decree of distribution is an adjudication of the validity of the trust, and of the title of the trustees to take under the will; and where such decree has become final by failure to appeal therefrom, the title of the trustees and the validity of the trust cannot be assailed upon a creditor's bill filed to subject to execution the property of a beneficiary of the trust, to whom the trustees were to pay a portion of the income of the estate during his life, as it should be received by them.

APPEAL from a judgment of the Superior Court of San Luis Obispo County. V. A. Gregg, Judge.

The facts are stated in the opinion of the court.

Graves & Graves, J. W. Wilcoxon, and Edward P. Cole, for Appellant.

Myrick & Deering, J. C. Webster, G. & A. Webster, and Wm. Shipsey, for Respondents.

TEMPLE, J.—This is a creditor's bill, in which it is sought to subject certain property to the satisfaction of plaintiff's execution against John Thompson. A general demurrer to the complaint was sustained, and the plaintiff, having declined to amend, appeals from the judgment entered.

Besides showing plaintiff's judgment and execution, the complaint contains allegations showing that Jonathan Thompson died in the county of San Luis Obispo in 1875 testate, and that by his will he devised certain property in trust. The trust is set out in the complaint. As to John Thompson, plaintiff's debtor, the language of the will is, after naming the trustees: "I devise and give to them upon trust all my property to invest the same and all accumulations thereof, and to divide and pay the income thereof as it is received, viz: . . . one-fourth to

John Thompson for life, remainder over in trust to his children, equally, who shall attain twenty-one years of age or marry."

The will was probated, and in 1877 the estate was distributed to the trustees in accordance with the terms of the will, and is now held by them. The demurrer was sustained, on the ground that the decree is *res adjudicata*.

All the questions raised on the appeal have been considered and determined in the case of *Crew v. Pratt*, *ante*, p. 131. The estate of Pratt was distributed in 1894, while the decree of distribution in the estate of Thompson was made in 1877, before the present constitution was adopted.

The learned counsel for the appellants contend, if I rightly apprehend their argument, that, as provided in section 1911 of the Code of Civil Procedure, that is only to be deemed adjudged in a judgment which appears on its face to have been so adjudged, "or which was actually or necessarily included therein or necessary thereto," and that the only fact in issue upon the application for a distribution in the probate court was, Were the persons named in the will the persons petitioning? They contend that no issue having been raised in the probate court as to the validity of the trust, the matter was not then determined, but was left open to be construed by a court of equity. As authority for this proposition they cite *Golson v. Dunlop*, 73 Cal. 165; *In re Vaughn*, 92 Cal. 193; *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553, and other cases.

Those cases are not in point. The code requires the court to distribute the residue of the estate left after full administration to the persons who by law are entitled thereto, and to name the persons entitled and the proportions or parts to which each shall be entitled.

Trustees appointed in a will to take property under a trust which by our law is void are not persons who are by law entitled to receive any portion of the estate. If the trust which the testator has attempted to create is void, the property which the will so disposes of must be distributed otherwise. To determine who the persons are who are entitled to the estate, and their proportionate parts, the court must pass upon the validity of the disposition attempted by the testator. It may thus be found that as to some portion of the estate the testator has died in-

testate. In such cases the heirs must be determined. This was held to be within the province of the probate court prior to the present constitution. In *Estate of Hinckley*, 58 Cal. 457, it was said: "It is under our system the necessary province of a probate court to inquire whether a valid trust has been created." And further, "It is within the province of the probate court to define the rights of all who have legally or equitably any interest in the property of the estate derived from the will, whether they are entitled to any present enjoyment or their interests are contingent." Hinckley died in 1877.

It must often become necessary for the probate court to construe the terms of a will in order to determine who are entitled to the estate, and to ascertain the interest to which they are entitled. Sometimes the court makes the distribution in the language of the will, but where there is any doubt as to the persons entitled, or as to the extent or nature of the estate or interest given by the terms of the will, the probate court not only may, but should, construe the will and define the interest given to each devisee. (See on this subject *Crew v. Pratt*, *supra*.)

The determination of the question as to the validity of the trust was, therefore, necessary to the decree of distribution.

The judgment is affirmed.

Henshaw, J., and McFarland, J., concurred.

[S. F. No. 906. In Bank.—December 17, 1897.]

In the Matter of the Estate of SOLOMON HEYDENFELDT,
Deceased.

APPEAL FROM DISTINCT ORDERS—SINGLE UNDERTAKING—INDISTINCT REFERENCE—DISMISSAL—REVIEW UPON MOTION.—A single undertaking given upon an appeal from several separate and distinct orders, which does not distinctly refer to either appeal, is entirely invalid for any purpose, and such appeal will be dismissed; nor will it be inquired into whether any of the orders were or were not appealable, where the motion to dismiss the appeal was made upon the ground that there has not been a compliance with the statutory provisions prescribing the mode of taking the appeal, and did not express the ground that any of the orders appealed from were not appealable.

ID.—FILING OF NEW UNDERTAKING—CONSTRUCTION OF CODE—VOID UNDERTAKING.—Section 954 of the Code of Civil Procedure only authorizes a new undertaking upon appeal to be filed, when the one filed is insufficient, and does not apply where the undertaking given is void, in which case it is as though no undertaking had been filed, and no appeal perfected within the time required by law, and no new undertaking can be permitted to be filed in the appellate court.

MOTION to dismiss an appeal from three orders of the Superior Court of the City and County of San Francisco. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

James L. Crittenden, Crittenden & Van Wyck, and Sidney M. Van Wyck, for Appellant.

T. M. Osmont, for Respondent.

McFALAND, J.—This cause is now before us on a motion to dismiss the appeal of Henrietta Heydenfeldt, upon the ground that said appeal was taken from three separate and distinct orders, and that only one undertaking on said appeal has been given and filed by said appellant.

The motion of appeal states that the appellant appeals "from each of the orders given and made herein granting the petitions of Zeila O. Hellings for payment of mortgage, and particularly from the order or decree heretofore, on or about June 1, 1896, filed herein, directing the redemption and exoneration of mortgaged premises upon the petition of Zeila O. Hellings; and also from the order made on or about February 17, 1896, denying to said Henrietta Heydenfeldt the right to participate in the proceedings upon the hearing of said petitions of Zelia O. Hellings for payment of mortgage; and from the order made on or about March 14, 1896, striking from the files the answers of Henrietta Heydenfeldt to said petitions of Zeila O. Hellings; and from, the whole and each and every part of each and every of the said orders and decree." The undertaking recites that Henrietta Heydenfeldt has appealed to the supreme court from the various orders mentioned in said notice of appeal, and the sureties undertake "that the said appellant will pay all damages and costs which may be awarded against her on said appeal or on a dismissal thereof, not exceeding three hundred (\$300) dollars."

It has been established by a long line of decisions of this court that an undertaking on appeal, such as the one given in this case, is entirely invalid for any purpose. (*People v. Center*, 61 Cal. 191; *Corcoran v. Desmond*, 71 Cal. 100, and previous cases there cited; *Home etc. Associates v. Wilkins*, 71 Cal. 626; *McCormick v. Belvin*, 96 Cal. 182; *Centerville etc. Co. v. Bachtold*, 109 Cal. 111; *Spreckels v. Spreckels*, 114 Cal. 60.) In the *Spreckels* case, *supra*, the facts differed materially from those in the case at bar.

Appellant contends that only one of the three orders appealed from is an appealable order, and that therefore the bond should be held as applicable to that order alone which is appealable. But where a motion to dismiss an appeal is not upon the ground that the thing appealed from is not appealable, but upon the ground that there has not been a compliance with the statutory provision prescribing the mode of taking an appeal, there we cannot consider whether either of the orders appealed from is appealable. This contention was disposed of adversely to appellant's views in *Centerville etc. Co. v. Bachtold*, *supra*. In that case the court said: "A motion to dismiss the appeal upon the ground that the order is not appealable assumes that the appeal has been perfected, and that there is before this court a proper authenticated record of the action of the superior court. . . . On the other hand, whether an appeal has been perfected is a question of fact depending upon the proceedings subsequent to the entry of the order of the court below. When a motion to dismiss an appeal is made upon this ground, the character or nature of the order appealed from is not involved, and the action of the court is limited to determining whether the steps taken for the appeal are in compliance with the statute prescribing the mode of taking an appeal."

Appellant has filed a new undertaking on appeal, approved by one of the justices of this court, and contends that such new undertaking supplies the want of a proper undertaking at the time the appeal was taken, under section 954 of the Code of Civil Procedure. But that was the precise contention that was made in *Home etc. Associates v. Wilkins*, *supra*, and in *Centerville etc. Co. v. Bachtold*, *supra*. In the former case the court, having held that in a case where there were appeals from two or

ders and only one undertaking filed which did not distinctly refer to either appeal, "the undertaking when filed is no undertaking at all," said: "An application is made to this court by appellant to be allowed to file the proper undertaking under section 954 of the Code of Civil Procedure. The section referred to does not authorize it. It only authorizes a new undertaking when the one filed is insufficient.) But in this case there has really been none filed. To allow new ones to be filed would be in effect to permit a new appeal to be perfected after the time fixed by law. (*Hastings v. Halleck*, 10 Cal. 31.)" The same ruling was made in *Centerville etc. Co. v. Bachtold*, *supra*.

The motion to dismiss the appeal is granted, and the appeal is dismissed.

Harrison, J., Van Fleet, J., and Garoutte, J., concurred.

BEATTY, C. J., dissenting.—I dissent. In my opinion but one of the orders was appealable, and there was but one appeal. Besides, I am unable to distinguish this case from *Spreckels v. Spreckels*, *supra*, in which a bond similarly defective was held to be amendable, and this bond has been amended.

Rehearing denied.

[L. A. No. 343. Department One.—December 18, 1897.]

WILLIAM D. WHIPPLE, Respondent, v. EMILY B. HOPKINS et al., Appellants.

APPEAL — REVIEW OF ORDER DENYING NEW TRIAL — AFFIDAVITS NOT IDENTIFIED.—Affidavits of newly discovered evidence printed in the transcript upon appeal, but not identified as having been the affidavits used upon the motion for a new trial, nor shown to have been filed in the court below, cannot be considered by this court upon appeal from the order denying a new trial.

ID.—BILL OF EXCEPTIONS—PROPER REFUSAL OF SETTLEMENT—FAILURE TO COMPLY WITH STATUTE.—Where the party proposing a bill of exceptions refuses to adopt the amendments, and fails to present the same for settlement within the time limited by section 650 of the Code of Civil Procedure, without offering any excuse therefor, the court is justified in refusing to settle the bill when subsequently presented for settlement.

ID.—ORDER REFUSING TO SETTLE BILL OF EXCEPTIONS NOT REVIEWABLE UPON APPEAL—MANDAMUS.—If a judge improperly refuses to settle a bill of exceptions, he may be compelled to act by writ of mandate, but his refusal to act is not an appealable order, and cannot be reviewed upon appeal from an order of the court denying a new trial, which must be determined upon the same record as that presented in the court below.

APPEAL from a judgment of the Superior Court of San Diego County and from an order denying a new trial. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

Parrish & Mossholder, and W. T. Phipps, for Appellants.

J. B. Mannix, for Respondent.

THE COURT.—Action to quiet title. The plaintiff had judgment, and the defendant, Horace A. Mayhew and Mary J. Mayhew, appeal from the judgment, and also from an order denying their motion for a new trial.

No point is made upon the appeal from the judgment. The complaint is sufficient, and the facts found support the judgment. The motion for a new trial was heard, as the order denying the motion recites, upon affidavits of newly discovered evidence. Affidavits are printed in the transcript, but they are in no way identified as having been the affidavits used upon the hearing of the motion, nor does the transcript show that they were even filed in the court below. That they cannot be considered by this court has often been decided. It is true that the court in its orders denying the motion refers to affidavits, but not in such a way as to identify these as the affidavits referred to. (*Fish v. Benson*, 71 Cal. 431.)

The defendants have also appealed from an order refusing to settle a bill of exceptions. After the decision upon the trial the defendants served upon the plaintiff their proposed bill of exceptions February 28, 1896, to which on March 18, 1896, the plaintiff proposed certain amendments. No action was taken by the defendants for the purpose of having the bill settled until August 21, 1896, when they gave notice that they would ask the court to disallow the amendments and settle the bill as pro-

posed by them. Upon the objection of the plaintiff, the court refused to settle the bill, upon the ground that the defendants did not, within ten days after the service on them of the proposed amendment, present it with the amendments for settlement, as required by section 659 of the Code of Civil Procedure, or offer any excuse for not so doing. As the defendants refused to adopt the amendments, they were required under section 650 of the Code of Civil Procedure, within ten days after receiving the proposed amendments, to present them with the proposed bill to the judge who tried the case, for settlement, upon five days' notice to the opposite party, and the failure to do so justified the court in refusing to settle the bill. (*Henry v. Merguire*, 106 Cal. 142.) In *Pendergrass v. Cross*, 73 Cal. 475, the moving party adopted the proposed amendments, and there was no occasion to give to the opposite party any notice of settlement.

Although this action of the court has been discussed in the briefs of the respective counsel, we do not wish to be considered as holding that the order is appealable. If a judge improperly refuses to settle a proposed bill of exceptions, he may be compelled to act by a writ of mandate, as was done in the case of *Pendergrass v. Cross*, *supra*, but his refusal to act is not an order which may be reviewed on appeal. The impropriety of the practice is seen by a consideration of the record in the present appeal. The court, in passing upon the motion for a new trial, could not consider any of the matters set forth in the proposed bill, and, as the appeal from its order denying a new trial must be determined upon the same record as that presented in the court below, this court is equally precluded from looking into the proposed bill. The action of the court in reference to the settlement of the bill is subsequent to the trial of the cause, and, of course, cannot be a ground for granting or denying the motion for a new trial. As the superior court denied the motion for a new trial, a reversal of its order refusing to settle the bill would leave no function for it to perform. There can be only one motion for a new trial in a cause, and, as that was brought to a hearing and decided by the court before the bill of exceptions was settled, and without any objection on that ground from the moving party, any subsequent action by the court for the purpose of settling the bill would be futile.

The appeal from the order refusing to settle the bill of exceptions is dismissed, and the judgment and order denying a new trial are affirmed.

[S. F. No. 669. Department One.—December 18, 1897.]

SAMUEL IRVINE, Respondent, v. **JOHN A. PERRY et al.**,
Respondents. **F. C. MARTIN**, Appellant.

FORECLOSURE OF MORTGAGE—SUBORDINATE LIENS—SALE OF PARCELS BY MORTGAGOR—ORDER OF SALE SUBJECT TO JUST RIGHTS.—The entire rule established by section 299 of the Civil Code, respecting the order of sale of the mortgaged premises, in case of transfer of parcels thereof, and of subordinate liens not coextensive with the mortgage, applies, under the terms of the statute, only where it can be followed without injustice to other persons.

ID.—SALE IN INVERSE ORDER—ASSUMPTION OF MORTGAGE DEBT BY GRANTEE.—The doctrine of selling mortgaged property, which has been alienated by the mortgagor, in the inverse order of alienation, is not unyielding; and where, upon a sale of part of the premises, the grantee has bound himself to pay the mortgage debt, or a proportionate part thereof, the portion purchased by him becomes in his hands and in the hands of those holding under him with notice, primarily chargeable with the mortgage debt, or such proportionate part thereof as he may have agreed to pay, as against the mortgagor, and as against subsequent purchasers of other parcels of the mortgaged premises.

ID.—COSTS—DISCRETION—APPEAL.—The costs in an action of foreclosure are in the discretion of the court, and, where the evidence is not returned upon appeal, it cannot be said that there was an abuse of discretion.

ID.—ATTORNEY'S FEES—STIPULATION—LIMITATION OF MORTGAGE SECURITY.—Where the mortgage purports only to secure the payment of a promissory note, and does not purport to secure the payment of attorney's fees, a stipulation in the mortgage for counsel fees at the rate of ten per cent upon the amount due, does not authorize the making of such fees a lien upon the property or the inclusion of them in the decree of sale.

APPEAL from a judgment of the Superior Court of Monterey County. **N. A. Dorn**, Judge.

The facts are stated in the opinion.

Isaac Frohman, for Appellant.

J. K. Alexander, for Respondent Irvine.

S. F. Geil, and **John J. Wyatt**, for Respondent Meeker.

SEARLS, C.—This appeal is taken by F. C. Martin, one of the defendants in the above-entitled cause, from a decree of foreclosure of four mortgages. The cause comes up on the judgment-roll, without any statement or bill of exceptions.

On the second day of June, 1890, the defendant, John A. Perry, being the owner of five lots or parcels of land situate in Monterey county, designated as lots Nos. 10, 11, 55, 56, and 92 of the Rancho Buena Vista, mortgaged all thereof to Samuel Irvine, the plaintiff herein, to secure the payment of a promissory note for \$4,000 and interest. The mortgage was duly recorded June 9, 1890.

November 10, 1890, Perry, the mortgagor, sold and conveyed all the lots to defendant D. G. McLean. Deed recorded on day of its date.

November 26, 1890, McLean conveyed lot 10, containing say 63 acres, to defendant Warren F. Meeker. Deed recorded January 31, 1891. Meeker, as a part of the consideration for the conveyance to him, agreed with McLean to pay \$8 per acre on said lot toward the payment of plaintiff's mortgage.

April 17, 1891, McLean conveyed lot 11 to defendant and appellant herein, F. C. Martin. Deed recorded April 28, 1891.

The negotiations for the purchase by Martin were made by and through defendant John A. Perry, who represented to appellant Martin that he, Perry, was the owner of lot 11, and that it was free from encumbrance, which fact was believed by Martin, who had no actual notice of plaintiff's mortgage, which mortgage, however, was of record. Martin caused no search of the records to be made and made no effort to ascertain the true condition of the title. Plaintiff was not a party to these negotiations and was not cognizant thereof. Martin has paid Perry \$2,400 on account of the purchase price of lot 11, and still owes him, Perry, \$500 on account thereof.

April 17, 1891, defendant McLean sold lot 55 to defendants Merritt J. Hall and I. E. Hall, and all of lot 56 to said Merritt J. Hall.

November 14, 1891, defendant D. G. McLean and Susan McLean, his wife, conveyed to defendant John A. Perry lot 92. Deed recorded November 17, 1891.

January 5, 1892, John A. Perry conveyed a portion of said lot

92, containing say fifteen acres, and duly described, to defendant Benoist. Deed duly recorded. The several purchasers entered into possession and have paid taxes, etc. The ownership by defendants of each of the above enumerated parcels of land is subsequent and subordinate to plaintiff's mortgage.

The findings are full and explicit, but too lengthy to be detailed in full. The following brief synopsis will suffice for the purposes of the case.

The intervenor, E. C. Smith, is the owner, as assignee, of three mortgages upon portions of the premises as follows: 1. A mortgage given by M. J. Hall and I. E. Hall to D. G. McLean to secure a promissory note for \$2,000, dated April 17, 1891, upon lot 55; 2. A mortgage dated April 17, 1891, executed by Merritt J. Hall to D. G. McLean upon lot 56, to secure a promissory note for \$1,200; 3. A mortgage dated April 17, 1891, executed by Frank C. Martin, the appellant herein, to D. G. McLean upon lot 11, to secure a promissory note for \$2,000.

The court found that \$814.02 was due as principal and interest by defendant Meeker on his agreement made upon the purchase of lot 10, to pay \$8 per acre on said lot 10 toward satisfying plaintiff's mortgage.

The court entered a decree of foreclosure of the four mortgages, holding that of the plaintiff Samuel Irvine prior in time and its lien superior to the three mortgages held by the intervenor, E. C. Smith. The decree provided for the sale of the lots separately, and in inverse order of their alienation, as provided by section 2899 of the Civil Code. The defendant F. C. Martin is the only appellant.

Lot 11, owned by appellant, was ordered to be sold after all of the other lots, except lot 10, concerning which the decree is as follows:

"Sixth. All of lot ten (10) shall be sold for at least the sum of \$814.02, which sum shall be applied to the payment of the amount due the plaintiff, whether the amount realized on the lots sold theretofore be sufficient or not, leaving the amount received from the sales of the other property, in excess of the amount necessary to pay plaintiff, after applying the said sum of \$814.02 received from the sale of lot ten (10) to the payment of plaintiff's claim, to be apportioned to the payment of the other mortgages herein foreclosed."

The reason of this provision is to be found in the findings, where it appears that Warren F. Meeker, who purchased lot 10, as a part of the consideration for his purchase, agreed to pay off at maturity, or become responsible for eight dollars per acre on the land by him purchased toward the satisfaction of the mortgage of the plaintiff. This sum amounted, as found by the court, to \$814.02, which the court treated as a charge on said lot 10, to go toward the satisfaction of plaintiff's first mortgage before recourse upon appellant's lot No. 11.

We need not concern ourselves as to the rights of the plaintiff and intervenor as between themselves, or as to any of the defendants except appellant Martin, for the reason that they are not here complaining. Appellant's position is briefly this: He purchased lot No. 11, one of five lots, upon which plaintiff held a mortgage. He executed a mortgage upon his lot, which is held by intervenor. The purchasers of two other of the lots gave mortgages upon their several lots. The mortgagor of all the lots under the first mortgage had sold them to sundry parties. Lot 10 was first sold. Appellant's lot 11 was next in order of sale, and the residue in regular order.

As all the other parcels were ordered to be sold in satisfaction of the first mortgage, prior to that of appellant, with the single exception of No. 10, and, as to that, it was only the excess of its value over \$814.02 that was postponed to appellant's lot, it must follow that appellant can have no cause of complaint except as to the postponement of the sale of lot 10, until after that of his own.

It is true that section 2899 of the Civil Code provides that: "Where one has a lien upon several things, and other persons have subordinate liens upon, or interests in, some but not all of the same things, the person having the prior lien, if he can do so without risk or loss to himself or injustice to other persons, must resort to the property in the following order on the demand of any party interested: 1. To the things upon which he has an exclusive lien; 2. To the things which are subject to the fewest subordinate liens; 3. In like manner inversely to the number of subordinate liens upon the same thing; and 4. When several things are within one of the foregoing classes, and subject to the same number of liens, resort must be had: . . . 5. To the

things which have been so transferred for a valuable consideration in the inverse order of transfer."

This entire rule applies only to those cases where in the language of the statute it can be followed without "injustice to other persons."

Where, as here, all of the mortgaged property has been sold in parcels to different parties at different times, it would be inequitable to apply the rule as contended for by appellant. Had a portion only of the mortgaged property been sold, the appellant, as a purchaser, would be entitled to invoke the rule as against the mortgagor who retained the residue thereof. So, too, in such a case, the holder of a subsequent lien upon a portion of the property could insist upon the application of the rule as against a prior lienholder and the mortgagor.

As a purchaser of a portion of the premises covered by the first mortgage, the right of appellant was to have the property sold on foreclosure in satisfaction of such mortgage in the inverse order of its alienation, which is precisely what was ordered by the decree.

It is true that the doctrine of selling mortgaged property which has been alienated by the mortgagor in the inverse order of alienation is not so unyielding but that it may be controlled by circumstances.

A familiar example of this is to be found in cases where in a sale of a part of the premises the grantee has bound himself to pay the mortgage. In such a case, the parcel thus purchased becomes in his hands, and those holding under him with notice, primarily chargeable with the mortgage debt, as against the mortgagor and grantor and as against subsequent purchasers of other parcels of the mortgaged premises. (Jones on Mortgages, sec. 1625; 3 Pomeroy's Equity Jurisprudence, sec. 1225; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547; *Williams v. Naftzger*, 103 Cal. 438; *Weyant v. Murphy*, 78 Cal. 278; 12 Am. St. Rep. 50.) So where the part purchased is subject to a proportion of the mortgage debt, it will be held *pro tanto* subject to the same rule. (Jones on Mortgages, sec. 1625, and cases there cited.) That rule was enforced here to the extent of the \$8 per acre agreed to be paid by the purchaser of lot No. 10.

Again, it is objected that Meeker's land (lot No. 10) was also

liable for its proportion of the costs. The costs were in the discretion of the court (Code Civ. Proc., sec. 1025), and, as we have not the evidence before us, we cannot say there was any abuse of discretion.

Again, the decree is blank as to plaintiff's costs, and it is not certain that any were allowed. At any rate, if allowed, the costs were to be paid generally out of the mortgaged property, and not by appellant specially.

The only other point calling for notice is that the counsel fees allowed by the court were not secured by the mortgage.

A copy of the mortgage is attached to the complaint, and contains the following clause in reference to counsel fees: "In case any action be brought to foreclose this mortgage for the recovery of any sums which may be due thereunder, counsel fees at the rate of ten per cent upon the amounts due shall be allowed and paid whether judgment be recovered or not."

The mortgage purports to be given "for the purpose of securing the payment of a promissory note, a copy whereof is as follows," etc.

The mortgage does not purport to be given to secure the payment of these attorneys' fees.

The case is on all fours with *Lee v. McCarthy* (Cal. 1894), 35 Pac. Rep. 1034. (See, also, *Clemens v. Luce*, 101 Cal. 432; *Boob v. Hall*, 107 Cal. 160; *Mason v. Luce*, 116 Cal. 233.) The allowance of the attorneys' fees was error.

We recommend that the cause be remanded with directions to the court below to modify the judgment by striking therefrom the amount of the attorneys' fees allowed; and that in all other respects the judgment appealed from be affirmed, and that each of the parties pay his own costs on this appeal.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the cause is remanded, with directions to the court below to modify the judgment by striking therefrom the amount of the attorneys' fees allowed; and that in all other respects the judgment appealed from is affirmed, and that each of the parties pay his own costs on this appeal.

Harrison, J., Garoutte, J., McFarland, J.

On January 17, 1898, the court rendered the following opinion of modification of judgment:

THE COURT.—The judgment heretofore rendered herein is modified by adding thereto a direction to the superior court to further modify its judgment by directing that lot ten (10) named in the "sixth" parcel of land to be sold by the sheriff shall be sold for at least the sum of \$890.74, instead of \$814.02, and that this sum of \$890.74 shall be applied to the payment of the amount due the plaintiff, leaving the amount received from the sales of other property after so applying said sum of \$890.74 to the plaintiff's claim to be apportioned to the payment of the other mortgages.

[S. F. No. 1011. Department One.—December 18, 1897.]

FREDERICK BALL, Respondent, v. GEORGE B. TOLMAN et al., Appellants.

MINING CORPORATIONS—RIVER MINING—USE OF DREDGING BOAT—FAILURE TO POST ACCOUNTS—STATUTORY LIABILITY OF DIRECTORS.—A corporation organized under the laws of this state for the purpose of mining, which carried on mining operations in the bed of the Sacramento river, by the use of a dredging boat, and appliances for the purpose of extracting gold from the debris in the bed of the stream, is within the provisions of the act of April 23, 1880, for the better protection of the stockholders in such corporations, and the fact that the purpose of the corporation was very feebly prosecuted, and that the work done was without profit, cannot dispense with or excuse the discharge of the duty of the directors to post an itemized account or balance sheet in the office of the corporation, as required by the terms of that act, and, upon their entire failure so to do, they are liable under the statute to a judgment at the suit of a stockholder for the sum of one thousand dollars liquidated damages, as penalty for the violation of that act.

Id.—INTENTIONAL FAILURE OF DIRECTORS—CASE DISTINGUISHED—IGNORANCE OF LAW.—The case of *Eyre v. Harmon*, 92 Cal. 580, in reference to the necessity of a willful and intentional violation of the statute by the directors of a mining corporation, has no application where there is an entire failure of the directors to comply with the statute, and no facts of excuse are set forth or attempted to be proved other than their ignorance of the statute.

Id.—CONSTRUCTION OF STATUTE—PENAL AND REMEDIAL ACT.—The act of April 23, 1880, for the better protection of stockholders in mining corporations is not only penal in its nature, but it is also remedial and of much consequence and value to stockholders, and it must receive a construction with reference to its beneficent objects as well as to its penal character.

ID.—IMMATERIAL EVIDENCE — BAD FAITH OF PLAINTIFF — DISCHARGE FROM SERVICE—REVENGE—KNOWLEDGE OF ACCOUNTS.—Evidence of letters of the plaintiff offered for the purpose of showing that the suit was brought in bad faith “solely to get even with defendant for removing him from his berth of assistant superintendent,” and not offered for purposes of impeachment of the plaintiff as a witness or to contradict his testimony, was properly excluded as immaterial; nor can the fact that plaintiff, by reason of his connection with the company, had knowledge of the accounts, and had the means of learning about them after his discharge, excuse noncompliance of the directors with the law.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion.

Moses G. Cobb, for Appellants.

J. M. Lewis, and I. F. Chapman, for Respondent.

CHIPMAN, C.—This action is brought under the act approved April 23, 1880, entitled “An act amendatory of an act for the better protection of the stockholders in corporations formed under the laws of the state of California for the purpose of carrying on and conducting the business of mining, approved March 30, 1874.” Trial by the court, and plaintiff had judgment for \$1,000 liquidated damages and as penalty for the violation of said act. From the judgment and order denying defendants’ motion for a new trial this appeal is taken on a statement of the case.

It appears from the evidence that the corporation of which defendants were directors, and in which plaintiff was a stockholder, fitted up a boat for dredging for gold in the sand in Oakland creek (Alameda county), but it does not appear that any work was done there. The boat was moved up the Sacramento river, and the dredger operated more or less in that river near and below the mouth of the American river during the months of January, February, and March, 1896, and finally the scheme was abandoned as a failure. Plaintiff was employed as assistant superintendent about three months, and ceased work as such on the last of January, 1896. The only mining operations carried

on were with the dredger, and the plan was to elevate the mud and sand from the bed of the river by an endless chain with buckets on it, and discharge the contents of the buckets in screens on the boat, and there, by an amalgamator and concentrator, save the gold supposed to be in this debris. There were never any returns from this mining. The books of the secretary showed expenditures of \$617.77, and receipts \$759.20, for the month of January; and for the month of February, disbursements \$345.10, and receipts \$319.10. All the receipts came from subscriptions of stockholders. It is not claimed by defendants that they at any time complied with the statute by making and posting the itemized accounts or the balance sheet required by its provisions.

1. Appellants contend that the dredging boat was merely experimental, and its operations were not "mining" in the sense of the statute of 1880; that the gathering of gold dust from the bottom of the Sacramento river or any other navigable stream would not be such "mining;" that the bottoms of navigable rivers are not the subject of private appropriation by individuals for the purpose of mining; that the shores of navigable rivers and the soil under the rivers belong to the state and not to the United States. We do not feel called upon to examine the numerous authorities submitted in support of the foregoing propositions.

It was held in *Francais v. Soms*, 92 Cal. 503, that the act in question applies to all corporations formed for the purpose of carrying on and conducting the business of mining. It is admitted that the corporation here was formed for that purpose, and it is also admitted that it carried on to some extent the business for which the company was organized, to wit, to take gold from the bed of the Sacramento river.

It is true in this case, as it was in *Francais v. Soms*, *supra*, that the purpose of the corporation was very feebly prosecuted. But it was there said: "The itemized accounts or balance sheets and reports would have shown very little, but that little might, in some cases, be of interest to stockholders, and we cannot apply the maxim, *De minimis non curat lex*, in this case, because we think the law does care for little things."

The principal contention is, that the particular work done by

the company was not "mining," and therefore appellants were not called upon to make any reports whatever under the act. It may be that if a corporation formed for mining purposes should engage in business entirely foreign to those purposes, and having no sort of relation to them, that the act would not require the directors to do those things mentioned in it. But that was not the case here. The company was organized "for the purpose of securing and working placer mines, to deal in mines and mining claims, and the erection of plants for working the same, and to do any other business connected therewith as the board of directors shall deem necessary."

It was held in *Miles v. Woodward*, 115 Cal. 308, that the law applies not only to corporations which extract gold or silver from ores, but equally to those which extract it by the methods of placer or hydraulic mining. Among the various methods of placer mining those of turning river and creek channels to expose the placers in their beds, and of dredging the beds where it is impracticable to divert the channel, are well known and recognized. Placer mining is simply extracting the gold from placers, wherever situated—in dry channels and in channels for the time filled with water. It does not make the process any the less placer mining that the gold is found in deep channels, in navigable streams, or in estuaries or creeks and rivers where the sea ebbs and flows. One of the defendants testified: "We went there for the purpose of raising the sand from the bottom of the Sacramento river for the purpose of getting what gold there was out of it." He testified further: "We filed mining claims on the river and had them recorded. . . . This was all the mining property we had."

It is immaterial, if true, that the river bed where navigable was not subject to location as a mining claim; the company did mining there, or endeavored to do so, and expended money of the corporation in the effort; and the requirements of the law or the consequences of its violation cannot be evaded by showing that the company was wrongfully searching for gold in a navigable stream. We do not think this view of the statute extends it beyond its obvious purpose and intent, as is claimed in appellant's second point. We are but following a reasonable construction already given the act in many cases.

2. It is contended that the violation of the statute must be willful and intentional, and that no penalty can be incurred or imposed unless the breach be with express reference to violating its terms or with criminal intent. This it is claimed was so held in *Eyre v. Harmon*, 92 Cal. 580.

The language and meaning of the court upon the point, in the case cited, were to some extent explained in *Miles v. Woodward*, *supra*, in the opinion by Mr. Justice Henshaw. By reference to *Eyre v. Harmon*, *supra*, it will be seen that a statement of receipts and expenditures, duly verified, was posted, and it was admitted that this statement was a balance sheet, and that the statement was posted for the purpose of complying with the law and was in the form used ever since the passage of the act, and no stockholder had ever complained until that suit was brought. It was in view of these facts, the court said, that section 3 of the act "simply makes the directors liable, to the penalty named, for a willful failure to have such reports made and accounts posted as are referred to in section 1. If the directors cause the reports of the superintendent to be made, and the monthly accounts to be posted as required by the statute, the law is complied with; otherwise not, and they incur the statutory penalty if this failure to do so was intentional on their part."

It was said in *Schenck v. Bandmann*, 81 Cal. 231, where this question of intent was under discussion (and which case, it was said in *Miles v. Woodward*, *supra*, should be read with *Eyre v. Harmon*, *supra*): "It may be that under possible circumstances the directors of a corporation, when they have failed to comply strictly with the law, should be held excused;" giving an example where circumstances rendered compliance impossible; "but, if so, the facts must be within the knowledge of the directors who are sued and should be set forth and proved."

In the case before us, no attempt to comply with the law was made, and there is nothing to bring the appellants within the facts appearing in *Eyre v. Harmon*, *supra*. The only evidence offered excusing the admitted neglect and failure of defendants was by way of the following question put to one of the defendants as a witness: "What did you know about this mining statute that plaintiff now invokes?" The court, properly we think, sustained an objection to the question. The maxim, "*Ignorantia*

legis neminem excusat," applies. Where there has been an entire failure to comply with the law, the mere ignorance of the law constitutes no exculpation. The act in question is not only penal in its nature, but it is also remedial and of much consequence and value to stockholders. (*Eyre v. Harmon, supra; Shanklin v. Gray*, 111 Cal. 88.) It must therefore receive a construction with reference to its beneficent objects as well as to its penal character.

3. The only remaining points found in appellants' brief are that the action was not brought in good faith, and that the court erred in excluding certain letters written by plaintiff which, it is claimed, would have shown that the motive of plaintiff in bringing the action "was solely to get even with the defendants for removing him from his berth of assistant superintendent."

(a) It may be true that plaintiff had knowledge, by reason of his connection with the company, of the accounts while he was in its employ, and that he had the means of learning about them after he was discharged by going to the books, but we think that such knowledge and means of knowledge would not excuse non-compliance with the law; there may have been other stockholders. (*Shanklin v. Gray, supra.*)

(b) When defendants offered certain letters of plaintiff in evidence, counsel stated that his object was to "show that this whole proceeding was instituted by plaintiff out of revenge." The Court: "If you wish to show his animus you can do that as a witness. You can question him as to his feelings toward the parties on cross-examination of him as a witness, simply, but not as a party. If he have a cause of action—if he was suing on a note—it would not be competent to show that he had any difficulties with the defendants. I will sustain the objection." The offer was not made for purposes of impeachment of the plaintiff as a witness or to contradict his testimony. The avowed purpose of counsel was to show revenge or animus, and nothing more. We see no error in the ruling.

The act of 1880 has been often challenged in this court. Efforts have been made to emasculate it by construction; its constitutionality and reasonableness have been assailed, without success. No doubt it has been used as an engine of malice and revenge. Still its objects are wise and praiseworthy and tend to

the protection of stockholders of corporations. It was amended February 26, 1897 (Stats. 1897, p. 39), so as to confine its operation to corporations "whose stock is listed and offered for sale at public exchange," and also in certain cases to limit recovery to the damage actually sustained. The amendment, however, came too late to serve the defendants.

It is recommended that the judgment and order be affirmed.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., McFarland, J.

Hearing in Bank denied.

[Sac. No. 285. In Bank.—December 18, 1897.]

IDA F. LEE, Executrix, etc., Respondent, v. M. E. MURPHY
et al., Appellants.

TRIAL—SUBMISSION OF CAUSE—AMENDMENT OF COMPLAINT—DISCRETION.—The power given under section 473 of the Code of Civil Procedure to allow amendments in the interest of justice, is in the discretion of the trial court; and the appellate court will not disturb the allowance of an amendment to the complaint made by the trial court, after the submission of the cause, where no abuse of discretion appears.

ID.—CONTINUATION OF TRIAL—FURTHER TESTIMONY OF PLAINTIFF—MOTION TO STRIKE OUT—OBJECTION TOO BROAD—DISCRETION.—Where the complaint was amended after the submission of the cause, and the trial was then continued for further hearing of evidence, a motion to strike out all further testimony given by the plaintiff in support of the amended complaint, as showing in contradiction of the affidavit for the amendment that the facts testified to were all previously known, is properly denied on account of the objection being too broad, where a portion of the testimony given tended to establish other and independent facts; and it was matter in the discretion of the court as to what further relevant testimony to allow.

FORECLOSURE OF MORTGAGE—EVIDENCE—MORTGAGE NOT PROPERLY RECORDED—GENERAL OBJECTION OF ADVERSE CLAIMANT—FAILURE TO EXCEPT—WAIVER.—In an action to foreclose a mortgage, which is not properly recorded, the mortgage is admissible in evidence as against the mortgagor; and it is incumbent upon one claiming ad-

versely to the mortgage, who objects to its admission in evidence, to point out specifically the ground of objection thereto; and where the objection interposed by the adverse claimant was a mere general objection to the mortgage as irrelevant, immaterial, and incompetent, without pointing out wherein it was such as against the objector, and no exception was taken to the ruling admitting the mortgage in evidence, all objection thereto by such adverse claimant is waived.

ID.—VOID ACKNOWLEDGMENT OF MORTGAGE—MORTGAGEE ACTING AS NOTARY — PRESUMPTION OF IDENTITY—RECORD NOT CONSTRUCTIVE NOTICE.—An acknowledgment of a mortgage made before a notary public bearing the same identical name with that of the mortgagee, and made in the county of the residence of both parties, must be presumed, from the identity of name, to have been taken before the mortgagee as a notary public, in the absence of proof to the contrary; and an acknowledgment so taken is void, and does not authorize any record of the mortgage, and the record thereof does not impart constructive notice to third parties of the rights of the mortgagee.

ID.—HOMESTEAD CLAIM BY WIFE OF MORTGAGOR—PRIORITY TO UNRECORDED MORTGAGE—ACTUAL NOTICE IMMATERIAL.—The rights of a homestead claimant are statutory, and are not subject to the application of the general principles of equity respecting actual notice to purchasers, nor is the homestead subject to forced sale under a mortgage, unless it was properly executed and recorded before the declaration of homestead was filed for record; and where the record of the mortgage was unauthorized and void, it must be treated as though not recorded, and a subsequent homestead claim filed by the wife of the mortgagor has validity and priority over the mortgage, notwithstanding she had actual notice of the mortgage.

ID.—MORTGAGE FOR PURCHASE MONEY—VENDOR'S LIEN—WAIVER—EXEMPTION OF HOMESTEAD.—Although the homestead is not exempt from forced sale as against a vendor's lien upon the homestead, yet where a mortgage is taken for the purchase money, the vendor's lien is thereby waived, and the homestead is exempt from execution, as against any mortgage upon the premises which was not recorded before the declaration of homestead was filed, notwithstanding such mortgage may have been given for the purchase money.

ID.—EQUITABLE LIEN FOR PURCHASE MONEY—MAXIM.—Under section 1241 of the Civil Code an equitable lien for purchase money, as distinguished from a vendor's lien, is not chargeable upon the homestead.

APPEAL from a judgment of the Superior Court of Sutter County and from an order denying a new trial. E. A. Davis, Judge.

The facts are stated in the opinion.

Martin Devine, and A. A. De Ligne, for Appellants.

W. T. Phipps, for Respondent.

CHIPMAN, C.—On March 11, 1892, the defendant, M. E. Murphy, executed a promissory note for fourteen hundred dollars to W. H. Lee, plaintiff's testator (and husband), and on the same day he executed a mortgage on the premises described in the complaint to said Lee, to secure the payment of said note. The mortgage was acknowledged by Murphy before Lee, the mortgagee, and the name of the mortgagee given in the mortgage and the name of the notary were identical.

The consideration of this note was money paid by said Lee to one A. K. Boutwell, at the request of said Murphy, as the purchase price of the land described in the mortgage. The deed was made direct from Boutwell to Murphy, and as a part of the transaction Murphy mortgaged the premises to Lee as security for the purchase price paid to Boutwell.

The deed bore the same date as the mortgage, and was recorded March 12, 1892, twenty-three minutes past nine o'clock A. M. The mortgage was recorded the same day seven minutes later.

On the twenty-fourth day of September, 1895, the defendant, Rachel Murphy, filed in the office of the county recorder of Sutton county a homestead on the mortgaged premises.

On the eighth day of November, 1895, plaintiff brought this action to foreclose said mortgage, making M. E. Murphy and his wife, Rachel, defendants. The cause was tried by the court, and judgment was rendered for plaintiff. The defendant, Rachel Murphy, appeals from the judgment, from the order denying defendant's motion to vacate and set aside the judgment, and for a new trial. The defense set up in the answer and relied on here is the homestead of defendant Rachel Murphy.

Considerable space is given in the record and in briefs of counsel as to the alleged error of the court in allowing plaintiff to amend her complaint after having gone to trial and submitted the case for decision. One of the amendments allowed was to the effect that the money loaned to Murphy was the purchase money paid for the land mortgaged. Defendant moved to strike this amended complaint from the files and to vacate and set aside the order granting plaintiff leave to amend, which motion was denied and defendant excepted. The power given under section 473 of the Code of Civil Procedure to allow

amendments in the interest of justice is uniformly held to be within the discretion of the trial court, and it has been frequently held that this court will not disturb the action of the trial court, except where an abuse of that discretion is shown. It is unusual to find it necessary to amend the complaint after a case has been submitted, but I find no limitation as to the time before judgment entered when the power of the court ceases, and even after judgment it may be exercised for the relief of a party where the judgment results from mistake, inadvertance, surprise, or excusable neglect.

The plaintiff was called as a witness in her own behalf and testified at considerable length to several different relevant matters, at the conclusion of which defendant moved to strike out her entire testimony on the ground that in her affidavit, upon which permission was given to take further testimony in support of the amended complaint, she stated that she had discovered new facts, whereas her testimony showed she must have known these facts all the time. The motion was denied, and this is assigned as error. Her testimony was not confined entirely to facts of which she showed she had previous knowledge. The objection was too broad. Her testimony tended to establish other and independent facts. Besides, it was a matter largely in the discretion of the court as to what further relevant testimony to allow. The record shows that "it was agreed that this hearing should be considered a continuation of the trial of the case had on December 13, 1895."

When the mortgage was offered in evidence by plaintiff, defendant Rachel Murphy objected to it as irrelevant, immaterial, and incompetent. The objection was overruled, and this ruling is specified as error. It does not appear from the transcript that an execution was taken to the ruling. The mortgage was clearly admissible as to defendant M. E. Murphy, the mortgagor, and, being so, it was incumbent upon defendant in making this general objection to point out specifically wherein the evidence would be irrelevant, immaterial, or incompetent. (*Thompson v. Thornton*, 50 Cal. 142; *Brumley v. Flint*, 87 Cal. 471; *Crocker v. Carpenter*, 98 Cal. 418.) But the defendant did not except, and the objection must be deemed to have been waived. (*McCartney v. Fitz Henry*, 16 Cal. 184; *Turner v. Tuolumne etc. Co.*, 25 Cal.

397; *Keeran v. Griffith*, 34 Cal. 580; *Russell v. Dennison*, 45 Cal. 338.)

The mortgage, however, is before us, having been offered by plaintiff and admitted by the court, and the fact was also shown that the mortgagee, W. H. Lee, now deceased, was the notary before whom it was acknowledged. There is no evidence, however, that defendant Rachel Murphy knew that it was acknowledged before the mortgagee, except such as would be imparted by the identity of the name of the notary and the mortgagee, but there is evidence, and the court so found, tending to show that she had actual knowledge of the mortgage prior to filing her homestead.

This brings us to consider defendants' points: 1. That the mortgage upon its face shows it was acknowledged by the mortgagee; 2. That therefore the mortgage was not entitled to record, and is to be deemed not recorded; and 3. That actual knowledge of the mortgage by appellant would not prevent her from filing a homestead that would have priority of the mortgage.

1. Does the identity of the name with that of the mortgagee raise the presumption of the identity of person?

Section 1963, subdivision 25, of the Code of Civil Procedure declares that certain presumptions are satisfactory, if uncontradicted, and, among them, "identity of person from identity of name."

In *Thompson v. Manrow*, 1 Cal. 428, defendant was sued in this state as John P. Manrow upon a judgment entered against John P. Manrow in the city of New York. There was no proof that they were the same persons. It was held that *prima facie* the defendant was the same person mentioned in the judgment. (See 1 Greenleaf on Evidence, sec. 575, note 3.)

In *Mott v. Smith*, 16 Cal. 534, it was held that the deed, from the identity of names, and by its reference to the source of title, contains sufficient *prima facie* evidence as to identity of person to admit it in evidence, and that before additional proof of such identity could be required, some circumstances must be shown to create doubts upon that point.

In *Carleton v. Townsend*, 28 Cal. 219, it was held that a deed offered in evidence to show the transmission of title from a for-

mer grantee, in which the name is identical with that of the grantee in the older deed, is *prima facie* evidence that the two persons are the same, even though the two deeds recite the residence of the person to be at different places.

In *Douglas v. Dakin*, 46 Cal. 49, it was held, where William J. Douglas was plaintiff in an action for rent, and the defendant set up a judgment obtained in another court against William J. Douglas without averring identity, that the identity of the parties is to be presumed from the identity of names.

In *Stapleton v. Pease*, 2 Mont. 550, a declaratory statement relating to a mining claim was made, under oath, before William Peck, county recorder. It was contended that there was no proof that the William Peck who testified as to his signature was William Peck, the county recorder. The court said such proof was not necessary; that identity of names is *prima facie* evidence of identity of persons; that the burden of proof was upon appellants, if they disputed the identity of William Peck, the witness, and William Peck, the recorder, to establish the fact. In all ordinary cases the rule would be a perfectly safe one and it would seldom happen that the party relying on nonidentity of the person could not easily prove the fact.

The mortgage was between two residents of the same county, was executed and acknowledged in that county, and the names on the face of the instrument were the same. I think this was *prima facie* evidence that the names related to one and the same person.

2. I am not aware of any statute law in this state prohibiting a notary from taking the acknowledgment of a conveyance of property in which he has an interest. We must, therefore, resort to the general law upon that subject, and it is uniform that no such thing can be legally done. Mr. Justice Temple said in *Merced Bank v. Rosenthal*, 99 Cal. 39: "Where the only effect of the acknowledgment is to impart notice by recording the deed, it would seem that to be void it must appear on the face of the instrument." We have seen that the identity of the name of the mortgagee and the notary in the case before us raised the presumption of identity of persons, and did, therefore, appear on the face of the mortgage. It was further said in the case last referred to: "It has been held that an acknowledgment before

the grantee of a deed is void." I have examined a great number of cases upon this point and find no disagreement. In *Wilson v. Traer*, 20 Iowa, 231, it was said: "It might, with some show of reason, be claimed that, since the acknowledgment is regular in form, and identity of the grantee with the officers taking it being always a matter to be shown *aliunde*, . . . the better rule would be to hold the record regular and imparting notice, and leave to third parties the right to avoid both the record and instrument by showing fraud in fact, if any existed. But a more critical examination of the question will show that such a rule would leave a broad door open to the perpetration of frauds, and tend greatly to unsettle the verity of our public records and defeat the purposes of our registration laws. It is always within the power of parties to secure a disinterested officer to take an acknowledgment, and it is certainly no hardship to require them to do so. There is no reason why the fundamental rule, which prohibits a person from being a judge in his own case, or an executive officer in his own behalf, should not apply to this class of executive, semijudicial duties. To hold that a party beneficially interested in an instrument is incapable of taking or certifying an acknowledgment of it, cannot work any possible injury to anyone, while it will keep closed a door of temptation, at least, to fraud and oppression."

And it was held that "the acknowledgment was void and did not authorize the record of the instrument, and, as a consequence such record did not impart any notice to third persons of the mortgagee's right under it, but, as between the parties to it, the mortgage is in full force and of binding efficacy." To like effect are *Brown v. Moore*, 38 Tex. 645; *Broesbeck v. Seeley*, 13 Mich. 329; *Stevens v. Hampton*, 46 Mo. 404; *Wasson v. Connor*, 54 Miss. 351; *Davis v. Beazley*, 75 Va. 491; *Bowden v. Parrish*, 86 Va. 67; 19 Am. St. Rep. 873; *Withers v. Baird*, 7 Watts, 227; 32 Am. Dec. 754. See, also, Devlin on Deeds, secs. 476, 477; Proffatt on Notaries, 2d ed., secs. 42, 43; Webb on Record of Title, sec. 67.)

If these decisions lead to a right conclusion, and I think they do, the record of the mortgage imparted no knowledge or notice to defendant, and the acknowledgment was void.

Plaintiff suggests that there was a literal compliance with the

statute because the mortgage was executed and was recorded, and that, as the object of the record is to impart notice, it is immaterial if the acknowledgment was void, for appellant had actual notice of the mortgage. But without a valid acknowledgment it was not entitled to be recorded, and, as we have seen, must be treated as though not recorded. Something more than notice is required, as we shall see later on.

3. We have, then, as to appellant, an unrecorded mortgage, executed prior to her homestead, of which she had actual notice. It is a mortgage, too, given to secure the purchase money paid for the land claimed by her under the homestead. Is she bound by this mortgage? By section 1217 of the Civil Code, it is provided that "an unrecorded instrument is valid as between the parties thereto and those who have notice thereof."

Under this section an unrecorded instrument is good as against a subsequent purchaser or mortgagee having actual notice of the unrecorded instrument. A mortgage is an instrument, and, if no statute stood in the way, I can see no reason why it would not be valid as against a homestead filed by a person having notice of the mortgage.

But section 1241 of the same code is invoked to show that homesteads are not controlled by section 1217. The section reads: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained; . . . 4. On debts secured by mortgages upon the premises, executed and recorded before the declaration of homestead was filed for record."

Two cases are cited to support appellant's contention: *Ontario Bank v. Gerry*, 91 Cal. 94; and *First Nat. Bank v. Bruce*, 94 Cal. 77. In neither one of these cases had there been any record made of the mortgage or lien, or attempted to be made. In both cases it was found as a fact that the wife had no actual notice of the mortgage, nor was the question of the purchase price of the land raised. It is not to be overlooked, however, that the language of the court points strongly to the conclusion that even actual knowledge by the wife of a previous unrecorded mortgage by the husband would not shut off her right to declare a homestead. Mr. Justice McFarland in *Ontario Bank v. Gerry*, *supra*, said: "But the doctrine that unrecorded deeds and mortgages are good, except as against subsequent purchasers

for a valuable consideration does not apply to homesteads. Rights to homesteads are defined by the provisions of the code which directly deal with that subject. The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead,' and a declaration of a homestead is not a 'conveyance' as that word is used generally in the code. Section 1241 of the Civil Code enumerates the cases where a homestead may be taken for a debt, and it can be so taken in no other instance. The only subdivision of that section upon which respondent could rest with any plausibility is the fourth, which is as follows: 'On debts secured by mortgages on the premises, executed and recorded before the declaration was filed for record.' It makes no difference that the mortgage (if it was a mortgage on the land) in the case at bar was executed by the husband before the legal title vested in the wife; the mortgage was not recorded 'before the declaration of homestead was filed,' and therefore cannot be enforced against the wife's claim of homestead."

By section 1241 of the Civil Code, the homestead is subject to forced sale in satisfaction of judgment obtained on vendor's liens upon the premises. The complaint sets out the facts creating what may be claimed to be a vendor's lien, or lien for the purchase money.

The homestead act of April 21, 1851 (Stats. 1851, p. 296) described this lien as a "vendor's lien." The act of March 13, 1860 (Stats. 1860, p. 87), described it as a "lien for purchase money." The act of May 12, 1862 (Stats. 1862, p. 519), described it as a "vendor's lien," and it has continued to be described ever since as a "vendor's lien." Does a vendor's lien exist here?

Our statute reads as follows: "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." (Civ. Code, sec. 3046.)

The vendor's lien, if any existed, was waived by the giving of the mortgage. (Overton on Liens, 672-75; Jones on Liens, sec. 1073, et seq.) The purchase money was not "unsecured otherwise than by the personal obligations of the buyer."

Respondent also claims a lien for the purchase money superior to the homestead. There is an equitable lien of this character

enforceable in a proper case and in respect of this lien the doctrine of waiver seems not to be the same as in the case of vendor's lien. But section 1241 of the Civil Code does not include the purchase money mortgage or lien among the exceptions. The only mortgage there mentioned is one executed and recorded, and, among the liens enumerated, the purchase money lien is not mentioned. It was included in the act of 1860, *supra*, but was dropped out and the vendor's lien substituted in the act of 1862, *supra*, and is now a vendor's lien. These two liens have some features in common, but are not identical. The vendor's lien mentioned in section 1241, *supra*, is the same lien mentioned in section 3046, *supra*. If the legislature had intended to include both in the exceptions, it would have done so in terms. *Inclusio unius est exclusio alterius*.

I think it is settled law in this state that the homestead can be made subject to execution and forced sale, in satisfaction of judgments obtained, in no other instances than those pointed out in section 1241 of the Civil Code. In *Richards v. Shear*, 70 Cal. 187, it was undertaken to enforce a materialman's lien for materials furnished in the erection of a building upon the homestead premises. The right was denied, and the court said: "Where the legislature has undertaken to deal with the subject, and has declared from what the homestead shall be exempt and with what it shall be charged, it only remains for the court to give effect to its provisions. Admittedly, the language of the section of the code specifying in what instances the homestead shall be subject to execution and forced sale does not include the liens of materialmen."

This case was decided in July, 1886, and on March 9, 1887, the legislature amended the act to include "contractors, subcontractors, artisans, architects, builders, laborers of every class, and materialmen."

The same question came up again in *Walsh v. McMenomy*, 74 Cal. 356, where an attempt was made to foreclose a mechanic's lien in favor of a materialman and for labor performed. The transactions took place before March 9, 1887. Plaintiff furnished material and performed work under a contract with the husband, of which the wife had knowledge and to which she consented, and at a time when no homestead right had attached; the

homestead was filed after the material was furnished and the work performed. It was here again held that the homestead could only be sold under execution or forced sale in the excepted cases mentioned in the Civil Code, and this notwithstanding the provisions of the mechanics' lien law giving a lien in just such a case.

Article XVII, section 1, of our state constitution provides as follows: "The legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families." Here is the direct mandate of the people acting in their sovereign capacity requiring the legislature to protect the homestead from forced sale. Of what the homestead shall consist, and how it shall be protected from forced sale, are matters left with the legislature to determine. The courts have no power to increase or diminish the homestead, nor to say when it shall or shall not be subject to forced sale. The legislature has from time to time so amended the law as to make the homestead subject to certain liens not previously protected; if the case of an unrecorded mortgage of which the husband or wife has actual notice is to be added to the exceptions, or if a lien for the purchase money is to be included with that of the vendor, it must be done by the legislature and not by the courts.

I confess to having reached this conclusion with great reluctance in this particular case, for natural justice would seem to demand that defendants should pay the purchase price of their home before being permitted to take shelter under the homestead law; but the courts are powerless to afford any relief. Besides, it must be admitted that plaintiff's testator was not wholly blameless. As a notary public he ought to have known that he could not legally certify to the acknowledgment of a deed conveying or mortgaging land to himself.

I have not overlooked the equitable consideration so persuasive in this case and so ably presented by counsel for respondent, but they all proceed from the assumption that the case is one for the application of general principles of equitable cognizance, whereas it is hedged in and controlled entirely by legislative enactment.

It is recommended that the judgment and the order denying a new trial be reversed, and that in any subsequent proceedings

the homestead rights of appellant be given priority to plaintiff's mortgage.

Searls, C., concurred.

For the reasons given in the foregoing opinion the judgment and the order denying a new trial are reversed, and in subsequent proceedings the homestead right of appellant be given priority to plaintiff's mortgage.

McFarland, J.,	Garoutte, J.,	Harrison, J.
Temple, J.,	Henshaw, J.	

Rehearing denied.

Upon the denial of the application for a rehearing the following opinion was filed on the 18th of January, 1898:

BEATTY, C. J.—Confessedly, this is a hard case. The defendant, upon a technical objection to the record of a mortgage, defeats a just claim. Plaintiff therefore urges in her petition for a rehearing that the court should have noticed and sustained her technical objection to the sufficiency of the answer to raise an issue as to the recording of the mortgage. It may be that the denial in the answer is insufficient in this particular, but the findings of the superior court, and the statement of the case, show that the trial was conducted upon the theory that the recording of the mortgage was in issue; and as we have frequently held, it is too late to raise such an objection for the first time in this court. The objection to the statement upon the ground that it contains no specifications of particulars in which the findings are unsupported by the evidence is immaterial, even if well founded, because the findings of the court establish that the mortgage was not recorded. A rehearing must be denied.

[L. A. No. 158. In Bank.—December 18, 1897.]

SANTA MONICA LUMBER & MILL COMPANY, Respondent, v. J. H. HEGE et al., Appellants.

MECHANIC'S LIEN—CONTRACT FOR MATERIALS—RECORD, WHEN NOT REQUIRED.—Where a lessee, for the purpose of constructing certain additions to the premises leased, purchased materials therefor of less value than one thousand dollars, the provisions of the code relating to a written contract and filing the same for record have no application.

ID.—LIEN FOR MATERIALS—TIME FOR NOTICE—COMPLETION OF BUILDING—PREMATURE FILING.—The lessee having caused the improvements to be constructed for himself, the party furnishing the materials was not an original contractor, and must file a notice of lien within thirty days after the completion of the building; and unless the building was completed before the notice of lien was filed, the filing was premature, and conferred no right to enforce the lien.

ID.—FINDING—COMPLETION BEFORE NOTICE—DATE IMMATERIAL—CONFLICT OF EVIDENCE.—A finding that the building was completed at a particular date, which was prior to the notice of lien, is not material so far as the date is concerned; and though there may be no evidence as to the date of completion, it is sufficient that there is evidence tending to show that the building was completed before the notice of lien was filed, and the finding cannot be disturbed on account of conflicting evidence upon that issue.

ID.—TEST OF COMPLETION—ABSENCE OF PLANS—PRESUMPTION—MATTERS NOT INCLUDED—TRIVIAL IMPERFECTION.—In the absence of any plans of the building, or means of test by which it could be determined when the building was completed, its completion must be determined by the court from all the circumstances of the case shown by the evidence; and where it appeared that no sidewalk was ever constructed, that the building was never painted, and that no eave-troughs or waterclosets were ever constructed, it is to be presumed, in the absence of evidence to the contrary, that the original plans of the building, did not include any of these matters and the court might properly so find; and the failure to make the ridge of the roof tight, and to putty the glass on the outside, is merely a defective performance of the work rather than a failure of completion, and was properly disregarded as a "trivial imperfection."

ID.—CONSTRUCTION BY LESSEE—LIABILITY OF OWNER—ABSENCE OF NOTICE.—Where improvements to the building were constructed by the lessee with the previous knowledge and permission of the owner, his failure to give the notice required by section 1192 of the Code of Civil Procedure rendered his interest in the land subject to the lien of one furnishing materials for the improvements; and it is immaterial whether they were constructed in the particular form, or at the particular place which was authorized by the owner.

ID.—VOID NOTICE OF LIEN—INCORRECT STATEMENT AS TO CONTRACT PRICE—VARIANCE.—The right to enforce a mechanic's lien depends upon a compliance with the statute; and not only must the notice of lien contain the statements required by section 1187 of the Code of Civil Procedure, but the statements thus made must be in accordance with the facts, and if they are not correctly stated the right to a lien is lost; and though proof that the contract was for the "regular market price" is not a substantial variance from an allegation that the contract was for what the materials were reasonably worth; yet where the notice incorrectly stated the amount of the balance due as the amount of the contract price of the lumber, and that no part thereof had been paid, proof that the contract was for a considerably larger price and that payments had been made thereon, shows a fatal variance in the terms of the contract from that stated in the notice, and renders the notice of lien defective and void.

ID.—DISTINCTION AS TO VARIANCE—PLEADING AND PROOF—NOTICE OF LIEN AND PROOF.—The effect of a variance between the pleading and proof is not governed by the same rules as in the case of a variance between the notice of lien and the proof. A variance between the pleading and proof is not material unless the adverse party has been misled thereby to his prejudice, while a variance between the notice of lien and the proof, showing that the statement of the contract set forth in the notice was untrue, is fatal to the lien.

APPEAL from a judgment of the Superior Court of Los Angeles County. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

Clarence A. Miller, for Appellants.

Tanner & Taft, for Respondent.

HARRISON, J.—Action for the foreclosure of a mechanic's lien. In May, 1894, the defendant Hege being the owner of a lot of land in the town of Santa Monica, on which there was a dwelling-house, verbally leased the same to his codefendant Naumann. Shortly after Naumann had entered into possession he obtained permission from Hege to construct certain additions to the building, and for that purpose purchased certain materials from the plaintiff which were used in their construction. August 11, 1894, the plaintiff filed with the county recorder its claim of lien therefor upon the land and buildings, and afterward brought the present action for its enforcement. Naumann suffered default, and judgment was rendered against him for the amount

claimed by the plaintiff, declaring said amount to be a lien upon the land, and directing its sale. From this judgment Hege has appealed.

As the amount of the materials purchased from the plaintiff was less than \$1,000 in value, the provisions of the code relating to a written contract and filing the same for record have no application. Naumann caused the improvements to be constructed for himself, and the plaintiff, not being an "original contractor" (*Sparks v. Butte County Gravel Co.*, 55 Cal. 389), was required to file its notice of lien within thirty days after the completion of the building. Unless the building was completed before the notice of lien was filed, the filing was premature and conferred no right to enforce the lien. (*Roylance v. San Luis Hotel Co.*, 74 Cal. 275; *Schwartz v. Knight*, 74 Cal. 432; *Willamette etc. Co. v. Los Angeles College Co.*, 94 Cal. 229.)

The court finds that the building was completed July 23, 1894, but this finding is attacked as not supported by the evidence. There is no evidence in the record fixing this day as the date on which the building was completed, but, as it was sufficient for the plaintiff to show that the building was completed before its notice of lien was filed, any finding of the particular day was not essential and may be disregarded. There was a conflict of evidence upon this issue, and we cannot say that the finding of the court in favor of the plaintiff was erroneous. Emerson, who worked as a carpenter on the building, testified that he finished work in the latter part of June, and that the buildings were completed "shortly after," and that at the time of the trial the building was in the same condition as then. Naumann testified that the building was not finished on August 11th, and, as items of its incompleteness, mentioned, among others, that it had not been painted and that a sidewalk had not been constructed. It was not shown that any plans of the building were ever prepared, or that there was any test by which it could be determined when it was completed, and, in the absence of such test, its completion would be determined by the court from all the circumstances shown by the evidence. Presumptively, a sidewalk would not be a part of a building; and, as it was shown that the building had never been painted, the court was authorized, in the absence of any evidence on the subject, to find that painting

was not included in the original plan. The same may be said of the absence of eave-troughs and waterclosets. The failure to make the ridge of the roof tight, or to putty the window glass on the outside, was a defective performance of the work rather than a failure to complete the building, and was properly considered by the court as a "trivial imperfection."

The court properly held that the building was constructed with the knowledge of the appellant, and that his failure to give the notice required by section 1192 of the Code of Civil Procedure, rendered his interest in the land subject to the lien. The buildings were constructed by Naumann with his permission, previously given, and the fact that they may not have been constructed in the particular form, or at the place which he authorized, does not relieve him from the knowledge that they were constructed upon his land.

In the notice of lien the plaintiff stated that it agreed to furnish such materials as were ordered by Naumann for said buildings, and to furnish the same as ordered by him; that no definite time was specified for payment therefor, and that they were to be paid for at the current market price; that the amount of the contract price of said lumber and materials furnished as aforesaid is \$244.59; that no part thereof has been paid, and that there is still due and owing thereon, after deducting all just credits and offsets, the sum of \$244.59. In the complaint herein the plaintiff alleges that the defendants agreed to pay to plaintiff what said materials were reasonably worth and that the material furnished by it was reasonably worth \$244.59. It was shown at the trial that the plaintiff agreed with Naumann to furnish the materials at the regular market prices; that the materials furnished were charged upon its books at the regular market price and amounted to the sum of \$419.59, upon which there were credits to the amount of \$175.

The right to enforce a mechanic's lien depends upon a compliance with the requirements of the statute. Unless the notice of the lien which is filed with the county recorder contains the statements required by section 1187 of the Code of Civil Procedure, the claimant is not entitled to his lien. This section requires the claim of a materialman to contain "a statement of

his demand after deducting all just credits and offsets," and also "a statement of the terms, time given, and conditions of his contract." The provision that the claim must contain these statements means that the statements thus contained must be correct and in accordance with the facts. If they are not correctly stated the right to a lien is lost. In *Malone v. Big Flat etc. Co.*, 76 Cal. 578, where the notice of lien stated an employment at a fixed rate of compensation, and the complaint proceeded upon a *quantum meruit* it was held to be such a variance as to preclude a recovery. In *Reed v. Norton*, 90 Cal. 590, where the notice of lien set forth that the materials were to be furnished for what they were reasonably worth, and the proof showed that a portion of them were furnished at an agreed price, a recovery was denied upon the ground that the notice was not such as the statute requires. In *Wagner v. Hansen*, 103 Cal. 104, the notice of lien stated that the claimant had furnished materials and labor for which he was to receive a fixed sum of money, and in his complaint made a similar allegation. At the trial he testified that, with the exception of a small item, there was no agreement as to price. It was held that this was not only a fatal variance, but that it showed that the statute had not been complied with, and that the plaintiff had acquired no lien.

The testimony in the present case shows that the terms of Naumann's contract with the plaintiff for furnishing the material was the same as that stated in the notice of lien. The "regular market price" is the same as the "current market price," and the averment in the complaint that Naumann agreed to pay therefor what the materials were reasonably worth is not such a variance between the pleading and the proof as to authorize a reversal. (Code Civ. Proc., sec. 469.) The effect of a variance between a pleading and the proof is not governed by the same rules as in the case of a variance between the notice of lien and the proof. The notice of lien must contain a correct statement of the facts required by the statute, and, unless so stated, no lien can be enforced; while a variance between the pleading and proof is not material unless the adverse party has been misled thereby to his prejudice. If the action in the present case had been merely to recover for the materials furnished, proof of the

market price would have been evidence of their value, and proof of an agreement to pay their market price would have sustained the allegations in the complaint.

In another particular, however, the notice was defective, and did not authorize the court to enforce the lien against the appellant.

After stating the terms of the contract, the notice states that "the amount of the contract price of said lumber and materials furnished, as aforesaid, is \$244.59, and that no part thereof has been paid"; and in the complaint to enforce the lien the plaintiff states that the material so furnished was and is reasonably worth the sum of \$244.59, and that no part thereof has been paid, whereas the plaintiff showed at the trial that the amount of the contract price for the materials furnished was \$419.59, and that there had been payments thereon to the amount of \$175. The plaintiff purported to state in its notice of lien the amount of the entire contract price, and it was required to state such amount truly. The appellant was not a party to this contract, and he had the right to be informed of the facts upon which the plaintiff claimed a lien upon his property. By learning from Naumann that \$175 had been paid upon the account for materials, he would have been authorized to settle with him upon that basis; but, whether he did settle or not, there could be no lien upon his property unless the notice was given as required by the statute. "The purpose of the record and statement must be to inform the owner, in case of a contractor and laborers rendering service under such contract, as to the extent and nature of a lienor's claim to facilitate investigation as to its merits. Such a statement as the above would be misleading. The lienor is required to verify the statement. In all essential particulars it must be true." (*Wagner v. Hansen, supra.*)

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

McFarland, J., Temple, J., Garoutte, J., and Honshaw, J., concurred.

[L. A. No. 270. Department One.—December 20, 1897.]

S. LYONS et al., Appellants, v. F. A. MARCHER et ux., Respondents.

PROCEEDINGS IN AID OF EXECUTION—FINDINGS NOT REQUIRED.—Proceedings in aid of execution are only a summary method of purging the debtor's conscience, and compelling the disclosure of any property he may have which is subject to execution; and it is not incumbent upon the court to make express findings in special proceedings of this character, and the action of the court cannot be reversed for want of such findings.

APPEAL from an order of the Superior Court of Los Angeles County dismissing proceedings in aid of execution. J. W. McKinley, Judge.

The facts are stated in the opinion.

Knight & Harpham, and Jones & Newby, for Appellants.

Walter Rose, and L. H. Valentine, for Respondents.

HAYNES, C.—Proceedings in aid of execution. Appellants obtained judgment against Mrs. C. A. Marcher for nine hundred and twenty-seven dollars and forty-nine cents in January, 1895, and an execution was duly issued thereon, and in January, 1896, while the execution was in the hands of the sheriff, and before its return, S. Lyons made an affidavit pursuant to sections 715 and 717 of the Code of Civil Procedure, reciting the judgment and issuance of the execution, and alleging that C. A. Marcher had property which she unjustly refused to apply toward the satisfaction of the judgment; that F. A. Marcher had property belonging to the judgment debtor exceeding fifty dollars, to wit, ten thousand dollars, or over, and was indebted to her in an amount exceeding fifty dollars, and also similar allegations as to A. E. Marcher.

An order for the examination of these persons was made and served, an examination had, and, after argument, the court denied appellants' application for an order requiring the persons cited to turn over property, and dismissed the citation; and from that order this appeal is taken.

The examination of the several persons cited is brought up in a bill of exceptions.

A point made for reversal is that findings were not waived, and none were made.

Appellants contend that such proceeding is a trial, and written findings should have been made, and cite sections 632 and 633 of the Code of Civil Procedure, and *McCullough v. Clark*, 41 Cal. 302.

The code sections above named are in that part relating to the trial of civil actions, and not to special proceedings. In *McCullough v. Clark*, *supr.*, it was said of this proceeding: "It is only a summary method of purging the debtor's conscience and compelling the disclosure of any property he may have which is subject to execution. . . . It is true there are no formal issues framed; for in the very nature of the proceeding it would generally be impossible to frame specific issues in advance of the examination of the judgment debtor."

On appeal from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of papers used on the hearing in the court below. (Code Civ. Proc., sec. 951.) There is here no mention of findings, nor of a judgment-roll, which includes the findings. Where the matter is heard upon oral evidence exceptions to decisions after judgment may be preserved by a bill thereof. (Code Civ. Proc., sec. 651.)

In *Miller v. Lux*, 100 Cal. 613, which was an appeal from an order settling certain accounts rendered by executors, it was said: "While in such a proceeding it is not incumbent upon the court to make and file express findings, still, when the account is assailed in any particular for matters not appearing on its face, the court may properly make express findings upon such issues."

As it is not incumbent upon the court to make express findings in special proceedings of the character here under consideration, appellants' point cannot be sustained.

We advise that the order appealed from be affirmed.

Searls, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

Garoutte, J., Harrison, J., McFarland, J.

[Crim. No. 306. Department Two.—December 20, 1897.]

THE PEOPLE, Respondent, v. JAMES WILSON, Appellant.

CRIMINAL LAW—ASSAULT WITH INTENT TO COMMIT CRIME AGAINST NATURE—SUFFICIENCY OF EVIDENCE—QUESTIONS FOR JURY.—Upon the trial of a defendant accused of an assault with intent to commit the infamous crime against nature, where there is evidence tending to show that defendant, after having unsuccessfully solicited consent to the act by the person upon whom the alleged assault was made, grabbed him and tried to roll him over; that he resisted and made some noise, and the defendant then desisted, and said he would not make him do it if he didn't want to, it is a question of fact for the jury whether the force testified to was used, and also what was the intent with which it was done, and the evidence was sufficient, if believed by the jury, to justify the conclusion that whatever force was used was with the intent and purpose to commit the crime alleged; and if any appreciable force was used with that intent, and the defendant desisted through fear of detection from any cause, the intended act being felonious and against the will of the prosecuting witness, it was an assault within the meaning of the Penal Code defining an assault, and defining the crime for which the defendant was prosecuted.

ID.—FEAR NOT ESSENTIAL TO ASSAULT—FEELINGS AND MOTIVES OF PROSECUTING WITNESS—SUPPORT OF VERDICT—RECOMMENDATION TO MERCY.—It was not essential to the offense charged that the assault should have put the person assaulted in fear, and the questions whether his feelings were not sensitive and were not greatly outraged, and whether the fact that no bodily injury was inflicted may suggest the possibility of some improper motive for the prosecution on his part, are questions for the jury; and it is sufficient to support a verdict of guilty of the offense charged, with a recommendation of the defendant to the extreme mercy of the court, that there was legal evidence upon which the verdict could be sustained, and that the recommendation made by the jury negatives the idea of passion or prejudice on their part.

APPEAL from a judgment of the Superior Court of Merced County and from an order denying a new trial. J. K. Law, Judge.

The facts are stated in the opinion.

George L. Crocker, and J. F. McSwain, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

HAYNES, C.—Appellant was convicted of an assault upon one George Ryan with intent to commit the infamous crime against nature, and was sentenced to imprisonment in the state prison at Folsom for the term of five years. Defendant in due time moved for a new trial, his motion was denied, and hence this appeal.

The only point made for reversal is that the evidence is insufficient to justify the verdict.

Only two witnesses were examined, namely, the prosecuting witness and the defendant. Both were at the time of the alleged offense inmates of the county jail of the county of Merced and occupied the same cell and the same bed. The prosecuting witness, in substance, testified that the defendant solicited his consent to the act, which was refused; that defendant said: "I won't make you do it; I never make any boy do it if he don't want to"; that the next night he again refused the solicitations of defendant, whereupon the defendant "grabbed hold" of him and tried to roll him over, that he resisted and made some noise, and the defendant desisted; that defendant did nothing after that. Upon cross-examination he repeated the statement of the act constituting the assault, and added: "He was trying to force me that night—he tried to force me by coaxing and everything. Q. That was all—just coaxed you—just asked you? A. Yes; I said no, and he said he would not make me do it if I didn't want to do it."

Defendant testified that he "did not attempt to commit" said crime on the prosecuting witness. He did not say whether he made the solicitations testified to by Ryan, nor whether he took hold of him and attempted to roll him over. The jury found him guilty and recommended him "to the extreme mercy of the court."

It is contended that there was no assault within the meaning of section 240 of the Penal Code, and that the evidence is insufficient to show that the physical act, alleged to constitute the assault, was committed with the intent charged in the information.

Whether appellant "grabbed hold" of the prosecuting witness, and attempted to turn him over was a question of fact for the jury to determine, as was also the question as to the intent with which it was done. The instructions given by the court to the

jury are not brought up in the record, and we must therefore assume that under proper instructions the jury found both of those facts against the defendant, for without such finding, the jury being properly instructed, the conclusion of guilt could not be reached.

The mere solicitation to commit the act is not made an offense under our code, but the solicitations preceding the alleged assault, together with the preparations made by the defendant for the ultimate act, together with the fact testified to by the prosecuting witness that in resisting he made some noise, whereupon the defendant desisted and told him to say nothing about it, if believed by the jury, was sufficient to justify the conclusion that whatever force was used was with the intent and purpose to commit the crime; and if any appreciable force was used with that intent, and the defendant desisted from fear of detection, whether that fear arose from the noise made by Ryan in resisting, or from a conviction induced by the resistance that if he persisted his offense would be made known, the intended act being felonious and against the will of Ryan, it was an assault within the meaning of section 240 of the Penal Code, defining an assault, and of section 220, under which the defendant was prosecuted.

It is urged that Ryan's conduct in going to sleep, in the same bed with defendant, and remaining there until morning, is inconsistent with his story of the alleged assault, and so improbable that it is insufficient to justify any reasonable man, unmoved by passion or prejudice, in rendering a verdict of guilty. But the fact that Ryan was not so frightened as to prevent sleep is not conclusive evidence that the assault was not committed, nor indeed was it inconsistent with the fact of the assault. It was not essential to the offense charged that the assault should have put Ryan in fear. If A should meet B in a secluded place and demand his money, and the demand not being complied with, should assault him, the fact that B stood his ground, and A thereupon desisted, the circumstance that B was not in fact put in fear would hardly be relied upon as evidence that A did not make an assault with intent to rob. It may show that Ryan was neither refined nor sensitive, that his feelings were not greatly outraged, and as no bodily injury was inflicted, it may suggest

the possibility of some improper motive on his part for the prosecution; but all these questions were for the jury. There was legal evidence upon which the verdict of guilty could be based and sustained. To justify this court in interfering, we must be able to say that there was no evidence upon which the verdict could be properly based, or that it was of such a character as to justify us in saying that a reasonable mind uninfluenced by passion or prejudice could not reach the conclusion of guilt. The verdict in this case by its recommendation "to the extreme mercy of the court," whatever may have induced it, clearly negatives the idea of passion or prejudice on the part of the jury. If we may speculate as to the reasons for this recommendation, we might conclude that the jury felt they must, under the evidence, render a verdict of guilty, but as the force was slight and not persistent, and Ryan not peculiarly sensitive, that a less aggravated case was not likely to occur, and that it should therefore receive the lightest sentence permitted by the law.

We cannot say that the court abused its discretion in refusing a new trial, and the judgment and order appealed from should therefore be affirmed.

Searls, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 671. Department Two.—December 20, 1897.]

MRS. M. A. PETERSON, Respondent, v. CITY OF SANTA ROSA, Appellant.

INJUNCTION—RELATIVE EQUITIES.—A court of chancery will not interpose by injunction as of course after the right of the plaintiff has been established at law; but it will consider the circumstances, the consequences of such action, and the real equity of the case; and each case must be governed by the circumstances that surround it, and by relative equities.

ID.—RIGHTS OF RIPARIAN OWNER—POLLUTION OF STREAM BY SEWAGE—NUISANCE—INJUNCTION AGAINST MUNICIPAL CORPORATION.—A riparian owner has a right of property in the waters of the stream,

as appurtenant to the land, and is entitled to have it flow in its natural purity, and may enjoin as an actionable nuisance the pollution of the stream by a municipal corporation which has caused sewage to flow therein, so as substantially to impair its value for ordinary purposes, and to render it at times offensive to the senses and unfit for domestic use, and the fact that the defendant is a municipal corporation does not enhance its rights, or palliate its wrongs in this respect.

ID.—SUPPLEMENTAL ANSWER—CONSTRUCTION OF SEWAGE PLANT—DEODORIZATION OF SEWAGE—FITNESS FOR DOMESTIC USE—BURDEN OF PROOF — PRESUMPTION.—A supplemental answer by the municipal corporation, setting forth that, since the commencement of the action, it had constructed and was operating a sewage plant, which rendered the sewage water clear and inodorous, does not constitute a defense to the injunction, in the absence of a showing that the water was rendered palatable and fit for use; and prior findings having established that the water of the stream was rendered unfit for use by the sewage, the burden of showing a change in that respect rested upon the defendant, and it must be presumed, in the absence of such a showing, that the water in that respect had not undergone a change.

APPEAL from part of a judgment of the Superior Court of Sonoma County granting a perpetual injunction. William R. Daingerfield, Judge.

The facts are stated in the opinion.

W. F. Cowan, and O. O. Weber, City Attorney, for Appellants.

J. B. Leppo, for Respondent.

SEARLS, C.—This is an action to restrain the defendant, a municipal corporation, from polluting the waters of Santa Rosa creek by discharging or permitting to run into said stream, above the lands of the plaintiff, any of the sewage from the city of Santa Rosa, the defendant herein, and to recover damages for past injury.

Plaintiff had judgment for one dollar damages and a perpetual injunction restraining defendant as prayed in her complaint. Defendant appeals from so much of the decree as awards an injunction. The cause comes up on the judgment-roll.

The record shows that the cause was tried before a jury and a verdict rendered in favor of plaintiff for one dollar; that thereafter, and before the findings were prepared, the cause was opened and testimony taken in support of the "amended supplemen-

tal answer" of defendant filed May 4, 1896 (the day of the jury trial). The eleventh finding by the court is in reference to the showing on such "amended supplemental answer," the object of which answer was to show to the court that defendant had, since the filing of its amended answer, been engaged in and had about completed a sewage disposal plant of approved kind to filter, precipitate, deodorize, and disinfect and render pure and harmless all the sewage of said city, etc., all of which would be completed and in full operation within a day or two after May 4, 1896. We condense in part and quote in part the findings as follows:

The city of Santa Rosa, defendant, at all the times herein mentioned, is and was a municipal corporation under the laws of the state of California, having a population of about seven thousand inhabitants. In 1886 and since that date it has constructed and maintained a sewer system for the purpose of receiving and carrying off from within its limits all the sewage, garbage, filth, and refuse matter collecting and accumulating in the defendant city.

For four years last past defendant has had a sewer farm outside of and about one and one-half miles west of the city, containing sixteen and eighty-six one-hundredths acres of land, which it uses in connection with its sewer system as a dumping ground and place of deposit for its sewage, garbage, filth, etc.

That under and pursuant to an ordinance of the city, cesspools, privy-vaults, etc., are required to be and are connected with and discharge into the sewers, and by and through them are conducted to the "sewer farm," and during high water a portion of said sewage was discharged into Santa Rosa creek in said city.

Santa Rosa creek is a stream "having sides, banks, and a bed," with a well-defined channel, which runs through the city, thence past said sewer farm down to and through certain lands which the plaintiff has owned and resided upon with her family for forty years. The water in Santa Rosa creek was naturally pure, clear, and fit for household purposes and for watering stock. The great quantity of the sewage caused it to overflow the sewer farm, and some substantial quantity has overflowed, and at the date of the trial was overflowing and discharging into Santa Rosa creek and mixing with the waters. The defendant has also at intervals and at the date of the verdict was discharging

directly from its ditches into Santa Rosa creek "some substantial quantity of said sewage," and the same has been and was being carried down said creek to and upon the lands of plaintiff, whereby the waters of said creek had become and were "poisoned and polluted and rendered impure and unfit for use." The sewage, etc., thus discharged into the creek and running through and upon the land of plaintiff for two years past "has been and is somewhat offensive at intervals to the senses, but not dangerous or injurious to the health of plaintiff or her family, and has been and now is a partial obstruction to the free use and enjoyment by plaintiff of her said land and premises."

If the acts of defendant are permitted to continue, it would be extremely difficult to estimate the damages, and restraint is necessary to prevent a multiplicity of actions, and plaintiff has no other plain, speedy, or adequate remedy at law.

Plaintiff has sustained damages in the sum of one dollar. Other parties, independent of defendant, have corrupted and poisoned Santa Rosa creek, but the damages to plaintiff caused thereby cannot be separated or estimated apart from the injury and damage caused by defendant.

"That since the filing of amended supplemental answer herein, the sewer plant described in said amended supplemental answer has been completed by the defendant and is in operation, and that before the order granting injunction was, on the eighteenth day of May, 1896, rendered herein as aforesaid, the sewage of said city was being treated by the process mentioned in the amended supplemental answer herein, and run through and operated upon by the sewage plant mentioned therein, and that the sewage water after it passed through said plant was clear and inodorous, but the evidence does not show whether or not it was then palatable or fit for use."

The pollution of water by the flow of sewage from towns or cities into streams whose waters are thereby injured or rendered unfit for use has frequently been a ground for the application for the preventive aid of equity by injunction. The doctrine is well established that the fouling or pollution of water in a stream by such sewage constitutes a nuisance and affords sufficient ground for relief by injunction.

It is said (High on Injunctions, sec. 810): "In conformity with this doctrine, the owners of land upon the banks of a

river below a city may enjoin the city authorities from polluting the river by sewage."

In *Attorney General v. Council of Birmingham*, 4 Kay & J. 528, the court indicated that in such cases only the right of plaintiff to relief, rather than the question of inconvenience to defendants, was to be considered, although the latter represented a large population.

We regard the foregoing as an extreme statement and deem it more proper to adopt the language of Swayne, J., in *Parker v. Winnipiseogee etc. Co.*, 2 Black, 553: "After the right has been established at law a court of chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case."

In *Curtis v. Winslow*, 38 Vt. 690, it was said: "In determining the right of a party to an injunction after a verdict in his favor by a court of law, the court will consider the relative loss to either party, the character of the property for which protection is sought, the character of the locality in which the nuisance exists, and whether the injury is properly compensable in damages."

If the injury is only occasional, and the damage is small, accidental, rather than a probable and necessary consequence, an injunction will be denied. (*Wood v. Sataliff*, 8 Eng. L. & Eq. 217.) In short, each case must be governed by the circumstances that surround it, and by relative equities. (Wood on Nuisances, sec. 550.)

Tested by these rules and by others which might be mentioned, and we think the facts as found by the court up to and prior to the trial, viz., May 4, 1896, warranted the court in its discretion in granting an injunction. Those facts showed: 1. An injury by fouling the water of Santa Rosa creek by permitting sewage to flow therein, and by turning it therein, at intervals, in substantial quantity, whereby the waters of said creek were polluted and rendered unfit for use; 2. That the sewage thus discharged rendered the water of the creek at times offensive to the senses, but not injurious to health. Yet it was a partial obstruction to the free use and enjoyment by plaintiff of her land; 3. It would be difficult to compute the damage; 4. An injunction is necessary to prevent a multiplicity of actions, etc; 5.

Defendant does not threaten to continue to discharge sewage into said creek.

These facts, except the last, are causes which warrant the award of a perpetual injunction, and we find no reason for disturbing that portion of the judgment appealed from, unless it is to be found in the last or eleventh finding, which we have quoted at length and which is based on testimony taken after the main trial and showing facts occurring subsequent to such trial.

As will be seen by the finding the sewage, as treated by defendant, has rendered the water clear and inodorous, but the question as to whether or not it is potable or fit for use remains undetermined for want of evidence upon which to base a deduction.

The previous findings on this question were against the defendant, and, as the burden of showing a change rested upon the defendant, we must presume, in the absence of proof, that the water in the respect indicated has not undergone a change.

The case then stands thus: Plaintiff, as the owner of lands through which the water of Santa Rosa creek flowed, had and still has a right of property in the waters of the stream. This right is a corporeal hereditament, appurtenant to the land and running with it. (*Alta Land Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217.) Her right as a riparian owner was, not only to have the water of the stream flow over her land in its usual volume, but to have it flow in its natural purity, and such pollution of the stream by the defendant as substantially impaired its value for the ordinary purposes of life, and render it measurably unfit for domestic purposes, is an actionable nuisance, and the fact that the defendant is a municipal corporation does not enhance its rights or palliate its wrongs in this respect. (Wood on Nuisances, sec. 427; High on Injunctions, 3d ed., sec. 810.)

We regard the present case as a close one, but under the findings, which are not challenged, we cannot interfere with the conclusion reached by the court below.

We recommend that the judgment be affirmed.

Chipman, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Henshaw, J., Harrison, J.

[S. F. Nos. 634, 635. Department Two.—December 20, 1897.]

WILLIAM M. FITZHUGH, Respondent, v. **THOMAS ASHWORTH**, Superintendent of Streets, and **C. S. TILTON**, Intervenor, Appellants.

STREET IMPROVEMENT—CONSTRUCTION OF SEWER—RESOLUTION OF INTENTION—COMPENSATION OF CITY ENGINEER—PAYMENT TO SUPERINTENDENT OF STREETS—WORK OF FORMER ENGINEER UNDER ABANDONED RESOLUTION—MANDAMUS.—Under the act of 1889, p. 162, which provides for work upon streets, etc., and for the construction of sewers within municipalities, the resolution of intention under which the work of the construction of a sewer is done, is the only foundation for the jurisdiction of the board to proceed with the work, and all "incidental expenses," including the compensation of the city engineer, which are required to be advanced by the contractor to the superintendent, for payment by him, are necessarily connected with the work done in the proceedings had under and in connection with such resolution, and property holders cannot be burdened with expenses incurred under any former abandoned resolution, nor can the compensation of a former city engineer for work done and plans and specifications and diagram prepared by him for the proposed construction of the same sewer under a former abandoned resolution be considered or taken as any part of the "incidental expenses" advanced by the contractor to the superintendent of streets, under a subsequent resolution of intention which was carried out, and the superintendent of streets may be compelled by *mandamus* to pay the compensation advanced for the city engineer to the one who acted under the latter resolution.

ID.—REFERENCE IN RESOLUTION TO FORMER PLANS—AID TO NEW CITY ENGINEER.—Plans and specifications do not constitute a necessary part of a resolution of intention, and, when specified therein, are superfluous, and need not be followed; and the fact that a subsequent resolution of intention to construct a sewer refers to the former plans and specifications prepared by a former city engineer under an abandoned resolution does not make the compensation of such former engineer any part of the incidental expenses to be advanced to the superintendent of streets under the subsequent resolution; and when the board ordered the new city engineer to make plans, specifications, diagram, etc., under such resolution, and the work was completed thereunder, the fact that the new city engineer was aided to some extent by the plans, maps, drawings, etc., made by the former engineer, does not entitle the compensation of the former engineer to be included in the incidental expenses so advanced, whatever other legal remedy, if any, he may have therefor.

ID.—MANDAMUS—DUTY ENJOINED BY LAW UPON SUPERINTENDENT OF STREETS—PAYMENT OF MONEY ADVANCED.—Money advanced to the superintendent of streets by the contractor to cover the compensa-

tion of the city engineer as part of the "incidental expenses" required by law to be so advanced to the superintendent of streets, is held by the superintendent of streets in his official capacity, and it is a duty enjoined upon him by law to pay the sum to the party entitled thereto; and *mandamus* is a proper proceeding to enforce the rights of such party.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. A. A. Sanderson, Judge.

The facts are stated in the opinion of the court.

A. J. Donovan, and John B. Gartland, for Thomas Ashworth, Appellant.

Robert Harrison, for C. S. Tilton, Intervenor, Appellant.

J. P. Langhorne, and L. J. Welch, for Respondent.

McFARLAND, J.—This is an appeal by the defendant Ashworth and the intervenor Tilton, from a judgment of the superior court in *mandamus*, whereby it was decreed that the defendant Ashworth, as superintendent of streets, etc., of the city and county of San Francisco, do pay to the plaintiff the sum of \$5,713, with interest. Appellants also appeal from an order denying a new trial.

The real contest is between the intervenor, Tilton, who was city and county surveyor and engineer from the first Monday in January, 1891, to the first Monday in January, 1893, and the respondent, who was such surveyor and engineer from the first Monday in January, 1893, to the first Monday in January, 1895. The law which provides for work upon streets, lanes, etc., and for the construction of sewers within municipalities, requires that a contractor for such work "must advance to the superintendent of streets, for payment by him," certain enumerated costs, and "other incidental expenses" (Stats. 1889, p. 162); and it is further provided that "the term 'incidental expenses,' as used in the act, shall include the compensation of the city engineer for work done by him." On December 13, 1893, while respondent was city surveyor and engineer, the superintendent of streets, who was then W. W. Ackerman, in pursuance of preliminary steps and orders regularly taken and made, en-

tered into a written contract in due from with one W. L. Prather, Jr., for the construction by the latter of what is called the "Richmond outlet sewer." Ackerman was superintendent until the first Monday of January, 1895, when the present appellant became superintendent. This contract was subsequently assigned by Prather to Henry Matthews, who duly performed the work provided for in the contract, and completed the sewer prior to January 5, 1895.

The resolution of intention, No. 8629, under which the work above mentioned was done, was passed May 1, 1893, and approved by the mayor May 4, 1893. By resolutions No. 8550, passed April 10th, No. 8718, passed May 22d, and No. 8882, passed June 19th—all in 1893, while respondent was city engineer—the board of supervisors directed the respondent to examine certain plans, etc., which had formerly been prepared, and report concerning the same; to "make a diagram of the property affected or benefited by the proposed work of constructing" said outlet sewer, "as expressed in resolution of intention No. 8629"; and to "prepare plans and specifications for the sewer and work provided for in said resolution of intention No. 8629." The court below found that the respondent complied with these several requirements, and there is sufficient evidence to support the finding. On June 19, 1893, the board passed resolution No. 8868, by which said work was ordered to be done. On November 6, 1893, the board passed resolution No. 9489, by which it fixed the compensation of respondent for his services as surveyor and engineer for surveying, making plans and specifications and diagrams in relation to said work, at the sum of \$7,515; and the court found, upon sufficient evidence to uphold the finding, that said resolution was not passed under misapprehension or mistake, or through any false representations made to the board by or on behalf of respondent, as charged by appellants. The court also found that afterward, during the progress of the work, respondent did other engineering work in connection with said sewer of the reasonable value of \$1,008, and that his compensation therefor, under fees theretofore fixed by the board, was the said sum of \$1,008 — making his whole demand \$8,523. For this latter sum he presented to the superintendent of streets a demand itemized and verified, with a credit thereon of \$2,810,

which had been paid him by the assignee of said contract, leaving a balance unpaid of \$5,713—which is the money involved in this action. The superintendent made an assessment to cover the expenses of said work, and included therein the sum of \$8,523, the amount of respondent's demand as compensation for engineering services, and no other sum of money was included in the assessment for any engineering services. Upon the delivery of the assessment, on June 20, 1895, by the superintendent to the assignee to the contractor, the latter paid to the former, defendant and appellant, the said sum of \$5,713. The assessment was made upon a certificate of the respondent that the work had been completed.

Upon the foregoing facts—if there were none other to be considered—it is clear that the judgment of the court below was right. The resolution of intention (No. 8629) to have the work done was passed while respondent was surveyor and engineer; subsequent steps were taken which led to the making of the contract and the completion of the work, all during his term of office; he was required by the board of supervisors to render certain engineering services, and compensation therefor was fixed by the board under authority expressly given that body by the street law (Stats. 1889, sec. 34, subd. 1, p. 171); the assessment was made upon the certificate of the respondent that the work had been completed; the exact amount of his demand, \$8,523, was included by the superintendent in the assessment as incidental expenses for engineering services, and the balance paid by the contractor for such expenses, \$5,713, is in the hands of the superintendent, the defendant and appellant herein. Under these circumstances, it was the clear duty of the appellant, Ashworth, to pay the said balance to respondent, unless there are other facts which change the legal aspect of the case.

But appellants contend that there are other facts in the case which show the conclusion above indicated to be incorrect. Those facts are briefly as follows: About two years before respondent became surveyor and engineer, on February 2, 1881, the board of supervisors passed a resolution, No. 4668, by which the intervenor, Tilton, who was then surveyor and engineer, was ordered to make an examination of the sewerage system of the Richmond district in anticipation of the construction of the

"Richmond outlet sewer," hereinbefore referred to. Tilton made such examination and reported to the board upon the subject. On November 9, 1891, the board passed resolution No. 5979, by which it directed Tilton, as city engineer, to prepare plans and specifications for a sewer to serve as an outlet for said Richmond district; and Tilton did prepare plans and specifications and filed the same with the clerk of the board, but the board never expressly approved the same. Afterward, on February 8, 1892, the board passed a resolution of intention, No. 6441, for the construction of said sewer, the plans, specifications, and boundaries of the said district mentioned in said resolution being those prepared by Tilton. On May 23, 1892, the board passed resolution No. 7037, by which it ordered Tilton to make a diagram of the property to be affected or benefited by the construction of said sewer and to be assessed to pay the expenses thereof; and in pursuance of the resolution Tilton did make a diagram and file the same with the clerk of the board; but the board never approved said diagram. The plans, specifications, and diagram prepared by Tilton were filed with the clerk of the board and were marked and called "sewer outlet" of said district. But there never was any construction of said sewer under said resolution of intention No. 6441, for the reason that under the plans the sewer was to be constructed in part through private lands, the right of way over which had been given by the owners of said lands; and the persons to whom the contract had been awarded refused to carry it out on the ground that the resolution of intention and all proceedings thereunder were void because the street law did not provide for the performance of any street improvement or the construction of a sewer in or through private property. All the proceedings under said resolution of intention No. 6441 were abandoned. In November, 1892, Tilton presented to the board his verified demand against the city and county of San Francisco, and the treasury thereof, for the sum of \$8,500, as compensation to him as surveyor and engineer for the performance by him of the work above stated; and on December 9, 1892, a few days before he went out of office, the board by resolution No. 8160 approved and passed to print his said demand for \$8,500 against the city and county. Tilton, also, after he had ceased to be city engineer and surveyor, filed in the office

of the then superintendent of streets his verified and itemized bill in the sum of \$8,500 for said services. Afterward, on March 11, 1893, the street law was amended by the legislature so as to give the board of supervisors power to cause the construction of sewers or sewers with outlets "in, over, or through any right of way granted or obtained for such purpose." Thereafter the board commenced new proceedings for the construction of said outlet sewer, and adopted the resolution of intention No. 8629, hereinabove referred to, and conducted the proceedings to the completion of the work during the incumbency of the office of surveyor and engineer by the respondent, Fitzhugh, as hereinabove set forth. In said resolution of intention No. 8629 it was resolved "that it is the intention of the board to order the following street work in the city and county of San Francisco, according to the plans and specifications prepared by C. S. Tilton, city engineer"; and reference was made to said documents on file in the clerk's office, called "sewer outlets," prepared by Tilton as aforesaid.

It is contended by appellants that under all the facts hereinabove stated, and in accordance with their views of certain other questions of fact which are found adversely to them by the court, it was the duty of the appellant, Ashworth, to pay to appellant Tilton the said \$5,713 as part of Tilton's said claim of \$8,500 for engineering services rendered in 1891 and 1892 under the abandoned resolution of intention No. 6441.

Appellants contend that Fitzhugh did not do any real engineering work in connection with said outlet sewer, but that he merely traced and copied the plans, specifications, diagram, etc., which Tilton had prepared under the former resolution of intention No. 6441. The court found, however, that the district affected and benefited by the work done under the resolution of intention No. 8629, and to be assessed for the expenses of the work, was "of greater extent and area than the district described in said resolution of intention No. 6441." The court further found that Fitzhugh made the diagram in question, which included the space of land fifty feet next to and on each side of the right of way of said sewer, as directed in resolution No. 8629; that said diagram was approved by the board, and that it was "the diagram made by plaintiff, and not the diagram made by C.

S. Tilton"; and that "in making said diagram plaintiff did not take tracing copies of the diagram prepared by C. S. Tilton." The court further finds: "That the drawings, plans, specifications, maps, and diagrams referred to in said resolution No. 8868 were those prepared as aforesaid by plaintiff, and were not any of those prepared by C. S. Tilton." There was evidence sufficient to support these findings of the court; although Fitzhugh was no doubt benefited in rendering his engineering services by the work formerly done by Tilton, the evidences of which were on file as public documents in the office of the clerk of the board of supervisors.

Tilton may be justly entitled to compensation by the city and county for the work he did in 1891 and 1892, under the abandoned resolution No. 6441, whether or not he has any legal remedy therefor; but the court correctly held that such compensation could not be legally included as "incidental expenses" of the work done under the subsequent and entirely new resolution of intention, No. 8629, to be paid by the contractor to the superintendent of streets. It is quite evident that the board never allowed Tilton's bill of \$8,500 for the purpose of being included in any assessment to be made under the resolution of intention No. 6441; for at the time of the passing to print of the resolution approving Tilton's bill the said resolution No. 6441 and all proceedings for the construction of the sewer under it had been abandoned. After the amendment of the street law, other and new proceedings were instituted for the construction of the sewer under resolution of intention No. 8629, and work done under that resolution could alone be included as "incidental expenses," within the meaning of the statute; and it is to be noticed that the exact amount of Fitzhugh's bill was included by the superintendent in the assessment, although in his answer to the intervention the superintendent for the first time claims that he intended the assessment to include Tilton's demand. If the demand of Tilton, as well as that of Fitzhugh, had been put in the assessment, the amount thereof would have been over \$17,000; and certainly the demand of Fitzhugh for work done under the resolution and proceedings in accordance with which the sewer was actually constructed, which demand was for services ordered by the board during said proceedings, and the compensation for which was

approved by the board, constituted, under any view, part of the incidental expenses which the contractor was required to pay to the superintendent before any assessment could be made, and which the superintendent was required to put into the assessment. The work was certainly not done under two resolutions of intention; it was done under the latter resolution, No. 8629, which alone was the foundation of the jurisdiction of the board to proceed with the work, and all "incidental expenses" were necessarily thus connected with the work done in the proceedings had under and in connection with said latter resolution. Property holders could not be burdened with expenses incurred under one or half a dozen former abandoned proceedings. This conclusion is not affected by the fact that in resolution of intention No. 8629 there was a statement referring to the former plans and specifications prepared by Tilton. Plans and specifications do not constitute a necessary part of a resolution of intention (*Harney v. Heller*, 47 Cal. 15); they are superfluous, and need not be followed. Immediately afterward the board ordered Fitzhugh to make plans, specifications, diagram, etc., under which the work was carried on and completed.

Under the foregoing views, our conclusion is, that the judgment of the court below was right and should be affirmed. It is not necessary to notice other points which merely present in different forms the main questions above discussed, which are determinative of the merits of the case.

The appellant, Ashworth, makes the point here, substantially for the first time, that *mandamus* is not the respondent's proper remedy. It is true that in his lengthy answer, covering about eighteen pages of the printed transcript, he does say in one place that he "denies that plaintiff has not a plain, speedy, and adequate remedy in the ordinary course of law for the cause of action or proceeding set forth in his said petition and complaint herein," but the prayer of his complaint is "that the court order the said C. S. Tilton to be brought in and made a party to his action or proceeding," and "that thereupon the court determine to whom the said sum of money be paid," and during the trial no question was raised as to the form of the remedy. Tilton, in his intervention, makes no objection to the form of proceeding, and prays that the said sum of \$5,713 be ordered paid to him

as part of his claim of \$8,500. Under these circumstances, we are not called upon to look very closely into the question whether or not the respondent had any other "speedy and adequate remedy." However, as the appellant Ashworth collected the money involved here as superintendent of streets, and now holds it in his official capacity, it is his duty, enjoined upon him by law, to pay the sum to the party entitled thereto; and under these circumstances we think that *mandamus* was a proper proceeding to enforce the respondent's rights in the premises.

Judgment and order appealed from are affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Beatty, C. J.; dissented from the order denying a hearing in Bank.

[Crim. No. 377. In Chambers.—December 21, 1897.]

Ex Parte WILLIAM WRIGHT on Habeas Corpus.

CRIMINAL LAW — JURISDICTION OF JUSTICES' COURT — REFUSAL TO CHANGE PLACE OF TRIAL—AFFIDAVIT OF PREJUDICE AND BIAS—APPEAL—HABEAS CORPUS.—A justice's court is not ousted of jurisdiction to try a defendant accused of misdemeanor by the mere filing of an affidavit of the defendant that he had reason to believe and did believe that he could not have a fair and impartial trial before the justice by reason of his prejudice and bias, and any error committed by the judge in refusing to change the place of trial on that ground, must be remedied by appeal from the judgment, which is not void, and *habeas corpus* does not lie.

APPLICATION to the Chief Justice for a writ of *habeas corpus* to the sheriff of Orange County, to test the jurisdiction of the Justice's Court of Santa Ana Township. George Huntington, Justice.

The facts are stated in the opinion.

Brooks & Trask, for Petitioner.

BEATTY, C. J.—Application for the writ of *habeas corpus* upon the ground that the justice of the peace, in whose court the

prisoner was convicted (by a jury) of a misdemeanor, was ousted of jurisdiction by the filing of an affidavit by defendant that he had reason to believe, and did believe, that he could not have a fair and impartial trial before said justice by reason of his prejudice and bias. (Pen. Code, sec. 1431, subd. 1.)

The refusal of the justice to change the place of trial may have been an error, and if so the prisoner has an ample remedy by appeal, but the justice did not exceed his jurisdiction in proceeding with the trial after overruling the motion for change of venue. (*Lowery v. Hogue*, 85 Cal. 600.) His judgment, therefore, is not void, and *habeas corpus* does not lie.

Writ denied.

[Sac. No. 383. Department One.—December 22, 1897.]

In the Matter of the Estate of JOSEPH BOODY, Deceased.

ESTATES OF DECEASED PERSONS—DISTRIBUTION—SEPARATE PROPERTY OF HUSBAND—PRESUMPTION FROM PURCHASE AFTER MARRIAGE—REBUTTING PROOF.—Property acquired by the husband before marriage is properly distributed as his separate estate; and the presumption that property purchased after marriage is community property is rebutted and overcome by proof that the property acquired after marriage was acquired by the ordinary use of his separate property, and that lands which appear to have been the nucleus of subsequent holdings was settled upon, possessed, and claimed by him long before his marriage, although not consummated by patent from the sources of paramount title until subsequent to the marriage.

APPEAL from an order of the Superior Court of San Joaquin County making partial distribution of the estate of a deceased person and from an order denying a new trial. Joseph H. Budd, Judge.

Minor & Ashley, Nicol & Orr, and Rodgers & Paterson, for Appellants.

Woods & Levinsky, and Baldwin & Thompson, for Respondents.

SEARLS, C.—This is an appeal from an order of partial distribution of the estate of Joseph B. Boody, and from an order refusing a new trial therein. The order distributes certain par-

cels of real estate belonging to said estate. The sole question in issue is whether the lands so distributed were community property or the separate property of Joseph B. Boody, deceased.

Joseph B. Boody died intestate, in the county of San Joaquin, November 7, 1893, without issue, leaving him surviving as his heirs at law Elizabeth Boody, his widow, Emily Foss, a sister, and the children of a deceased brother. Elizabeth Boody, the widow, died intestate November 10, 1893, without issue, leaving as her next of kin and heirs at law, a sister, one child of a deceased sister, and the children of certain deceased brothers.

The heirs at law of Elizabeth Boody claimed on the distribution that the property in controversy was the community property of Joseph B. and Elizabeth Boody, his wife, and hence that they were entitled of right to have distributed to them three-fourths thereof. The court below denied this claim. It found that all the real estate involved was the separate property of Joseph B. Boody, and accordingly distributed to the heirs of Elizabeth but one-half thereof, and the other half to the heirs of Joseph B. Boody.

The heirs of Elizabeth appeal from the decree and from an order denying their motion for a new trial, and their contention is, that the finding as to the separate character of the property is not warranted by the evidence. This cause was here once before upon an appeal involving precisely the same question, whereupon the decree of the court below was reversed.

Upon the going down of the *remittitur*, another trial was had, in which the precise evidence taken on the former trial was introduced and certain other witnesses, four in number, were called and testified on behalf of respondents. The case on the former appeal is reported in 113 Cal. 682.

In reference to that case, we may say that the comments of this court upon the evidence are sufficiently full and specific to lead to an understanding of its scope and effect, and reference is had thereto for an exposition of the facts therein stated. We need, therefore, only comment upon the additional testimony adduced at the last trial.

It is proper to state that Joseph Boody and Elizabeth Boody (*nee* Mülvey) intermarried December 31, 1857. The additional

evidence at the last trial showed without contradiction that Joseph B. Boody was born in New Hampshire in 1821, was a machinist by trade, and, prior to his coming to California in 1851, he had loaned money at a good percentage, and when he came to California he had and brought with him fifteen hundred dollars and left real estate in New Hampshire which was sold in 1879 for one thousand dollars and the proceeds remitted to him.

Arrived in this state, Mr. Boody engaged for a brief period in mining, by which he made five hundred dollars, and then went north for a short time and mined, but with what result is not known. He returned and engaged in teaming at Mokelumne Hill, and in hauling water for the supply of citizens, which he sold at one bit a bucket—eight buckets for one dollar. He had one four-horse team worth two thousand five hundred dollars and one six-mule team of the value of three thousand five hundred dollars.

Mr. S. L. Magee, a merchant at Mokelumne Hill who knew Boody well, described him as an industrious, thrifty, prudent man without bad habits. The witness judged that when Boody left and settled in San Joaquin county (1853) he had from twelve thousand to fifteen thousand dollars. This judgment was formed from the witness' knowledge of the man, the business he was doing, and the manner of doing it. He had money and was reputed to be a money lender. The witness thought Boody used to put money in his, witness', safe, and that he borrowed money from him, but could not say positively.

In 1853, Boody went to San Joaquin county, settled upon a tract of land known as "Locust Shade," formed a partnership with one Heath, and engaged in farming. They were good farmers; prices were good; they raised large crops, and were reputed to have money to loan.

One witness (J. H. Tone) never borrowed money from them, but sold them a note for three hundred dollars.

Another witness (C. L. Leach), who described them as reputed money lenders, borrowed one thousand dollars from Boody, but this was in 1861, and consequently after Boody married.

They were farming in several places prior to 1857; farmed from one to five hundred acres; averaged say twenty-five bushels

to the acre, and sold on an average at about two cents per pound. They are described as the largest farmers in that region at that time, and as being successful farmers.

All the property distributed was purchased during marriage. The purchase price of all the land was nine thousand three hundred and sixty dollars, of which Boody owned an undivided one-half, and his copartner, Heath, the other half. The court below found that Boody was at the time of his marriage worth seven thousand dollars, besides real estate in New Hampshire worth one thousand dollars, etc., and that he paid four thousand six hundred and eighty dollars for his half interest in the land, all of which was his separate property owned by him before marriage, and by the ordinary use of such separate property after his marriage. To the new evidence introduced at the second trial there was nothing new offered in contradiction. Indeed, there is no direct evidence that Boody ever made any money after his marriage.

We think the case is presented in a very different aspect from that in which it appeared upon the former trial, and that the evidence raises a presumption sufficient to dispel the general presumption of community property because purchased subsequent to marriage. The lands which seem to have been the nucleus of the subsequent holdings were settled upon, possessed, and claimed by Boody and Heath long before the marriage of the former. The Locust Shade place was settled upon by Boody February 20, 1853, and improved by a house, etc., and when it was surveyed in 1866 he filed his pre-emption claim thereon and in due time procured a patent from the government.

Heath and Boody had also purchased what was known as the Pico title to the swamp land tract, and when afterward the Pico title failed, Heath again purchased from the state the same land under the swamp land act. They each conveyed to the other one-half of their holdings. Their several titles were thus initiated before the marriage of Boody, although not consummated by conveyance from the sources of the paramount title until subsequent to such marriage. *Lake v. Lake*, 52 Cal. 428, *Estate of Higgins*, 65 Cal. 407, *Harris v. Harris*, 71 Cal. 314, *In re Lamb*, 95 Cal. 397, and *In re Bauer*, 79 Cal. 304, are authorities upholding the conclusions of fact and law reached by the court below.

We have examined the exceptions reserved by the appellant at the trial. Counsel have not urged them here, and they do not call for comment. Upon a review of the whole record, we recommend that the decree and order appealed from be affirmed.

Belcher, C., and Britt, C., concurred.

For the reasons given in the foregoing opinions the decree and order appealed from are affirmed.

Harrison, J., Garoutte, J., McFarland, J.

Hearing in Bank denied.

[S. F. No. 770. Department Two.—December 27, 1897.]

In the Matter of the Estate of JOHN M. CAVARLY, Deceased.

VOID TRUST UNDER WILL — SUSPENSION OF POWER OF ALIENATION.—A trust attempted to be created under the will of a testator, for the benefit of his children, by the terms of which the trustee was to divide the net income of the residue of his estate in equal shares among them to the survivors of them (the issue of any deceased child to share in such distribution by right of representation) until the younger son, then aged seventeen years, shall, or would if living, reach the age of thirty years, and at the expiration of such time to divide and distribute the said residue of his estate in equal shares among such of his children as may then be living, and the issue of any deceased child, such issue to share in the distribution *per stirpes* and not *per capita*, is void, as suspending the power of alienation for a time certain, and not dependent upon any life or lives in being.

ID.—CONSTRUCTION OF STATUTE—PERPETUITIES — FUTURE ESTATES — TIME OF VESTING—REMOTENESS—ALIENABILITY.—Our statute prohibiting the suspension of the power of alienation is not, properly speaking, against perpetuities, but simply restraints upon alienation, and makes a future estate void in its creation, if, by any possibility it may suspend the power of alienation beyond the prescribed period regardless of the time of vesting of such estate; nor does it insist upon the vesting of estates, but only upon their alienability, and the doctrine of remoteness has no materiality, except as it affects alienability.

ID.—VOID POSTPONEMENT OF POSSESSION—INVALIDITY OF TRUST—RULES OF CONSTRUCTION—INTENTION OF TESTATOR.—The rule that when an absolute estate is granted, but the right of possession and enjoyment is postponed, solely for the supposed benefit of the grantee, such postponement is void, as applied to future estates vesting in the issue of the children of the testator under the will, cannot affect

the invalidity of the trust attempted to be created by the will, which if valid, would operate to suspend the power of alienation for a fixed period; but the rule that when a testamentary disposition is made to a class, and possession is postponed, it includes all persons within the class at the time to which possession is postponed, and the rule of construction of a gift to a class that only those are included who are in existence at the time of the distribution, and the further rule that the word "issue" ordinarily means descendants to any degree, are in harmony with the testator's manifest intent, disclosed by the terms of the will to keep the property in his family and beyond the power of his descendants to dispose of for the prescribed period, and the case is clearly within the prohibition of the statute against the suspension of the power of alienation.

APPEAL from an order of the Superior Court of the City and County of San Francisco making partial distribution of the estate of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Chickering, Thomas & Gregory, and Gerstle & Sloss, for Appellant.

Reddy, Campbell & Metson, and Ira D. Orton, for Respondent John M. Cavarly.

TEMPLE, J.—John M. Cavarly died in 1895 testate. The will was admitted to probate and letters testamentary were issued to the Union Trust Company of San Francisco in accordance with the terms of the will.

The estate as appraised consisted of personal property of the value of fifty thousand three hundred and sixty-three dollars and forty-one cents, and real property valued at thirty-seven thousand two hundred and ten dollars.

After some small legacies the testator attempted to dispose of the remaining estate as follows: "Fourth. All the rest, residue, and remainder of the estate, property, and effects, personal, real, and mixed, whatsoever and wheresoever situated, of which I may die seised or possessed, I give, devise, and bequeath unto my executor and trustee, hereinafter named, and to its successor and successors forever, in trust nevertheless, for the following uses and purposes, that is to say: "To have and to hold the same in trust for the equal use and benefit of my five children, to wit: My daughter, Ann Elizabeth, the wife of Edward F. Henzel, aged

about twenty-eight years; my daughter, Julia Frances Cavarly, aged about twenty-four years; my daughter, Jennie Day Cavarly, aged about twenty-three years; my son, John Mansfield Cavarly, Jr., aged about twenty years; and my son, Frank Bolles Cavarly, aged about seventeen years.

"And to divide the net income of the residue of my said estate in equal shares among my said children to the survivors of them (the issue of any deceased child to share in such distribution by right of representation) until my said younger son, Frank Bolles Cavarly, shall, or would if living, reach the age of thirty years, and at the expiration of such time to divide and distribute the said residue of my estate in equal shares among such of my children as may then be living and the issue of any deceased child, such issue to share in the distribution *per stirpes* and not *per capita*.

"In the event that any of my children should die before my death, leaving issue, such issue is to take the share in the estate which his, her, or their parent would have taken if living."

The beneficiaries of the trust which the testator thus attempted to create were his sole heirs at law.

In September, 1896, John M. Cavarly, son of the deceased and a beneficiary named in the trust, applied for a partial distribution under section 1658 of the Code of Civil Procedure. In his petition he set out the facts required in regard to indebtedness, etc., and averred that the trust attempted to be created was void, and asked that the portion of the property to which he was entitled be distributed to him. The court found the facts necessary to warrant a partial distribution, adjudge the trust void, and granted the petition. The executor appeals.

The objection to the trust is, that it suspends the power of alienation for a period certain and not dependent upon any life or lives in being. The appellant contends that the power of alienation is not suspended for a time certain, but that the trust will end and the property vest in possession, at least, upon the death of the last survivor of the beneficiaries named, whenever that shall occur.

Appellant contends that there are only three possible ways in which the property can go: 1. Some of the children of the testator may live to the end of the period. 2. All may die with-

in the period, leaving no issue. In such event the trust would end with the death of the last survivor; because the purpose of its creation would then fail. (Civ. Code, sec. 871.) 3. All of the testator's children may die within the period, one or more of them leaving issue.

It is contended that in such event the issue, or grandchildren of the testator, would take at once a vested estate in possession.

The children of the testator, it is said, do not take a vested estate because there is a gift over. If one of them were to die within the period, without issue, the portion which he might have taken would go under the terms of the trust to the survivors. So long as one of the named beneficiaries lives, it is, within the prescribed period, uncertain whether the remainder will vest in him. The estate will vest in such as may be living, and in the issue of any deceased child. But it is claimed that there is no gift over, as to the grandchildren. They, upon the death of their parents within the period, become vested with an indefeasible estate, and only the enjoyment and possession is postponed by the terms of the trust. And if all the children of the testator were dead, their children, being the only persons living and having an interest in the property, could insist upon immediate possession. The postponement is void, as against public policy, and as repugnant to the estate granted. (*Saunders v. Vautier*, 4 Beav. 115; *Gray on Restraints on Alienation*, sec. 105.)

In such case, the direction to postpone is void, and the validity of the gift is not affected by the fact that the time fixed for possession is beyond the limits allowed by the rule against restraints on alienation. The postponement being void, the estate does vest in possession within the period allowed. (*Gray on Perpetuities*, sec. 120; 1 *Jarman on Wills*, 292.)

We are not disposed to dispute these propositions laid down by the learned counsel of the appellant. Our statute is not, properly speaking, against perpetuities. It simply prohibits restraints upon alienation. The declaration that a future estate is void in its creation, which thus suspends the power of alienation, is to the same end. It is void if by any possibility it may suspend the absolute power of alienation beyond the prescribed period. Upon this point Chaplin, in his work on Suspension of

Alienation, section 1, remarks—speaking of the New York statute, from which ours was copied—that it affects all estates of every character which are capable of interfering with the power of alienation, and, secondly, that it does not insist upon the vesting of estates, but only their alienability. The doctrine of remoteness, therefore, has no materiality, except as it affects alienability.

But, keeping in view the rule that when an absolute estate is granted, but the right of possession and enjoyment is postponed, solely for the supposed benefit of the grantee, such postponement is void, is in the power of alienation unduly suspended by the terms of this trust? It is the rule that when a testamentary disposition is made to a class, and possession is postponed, it includes all persons within the class at the time to which possession is postponed. (Civ. Code, sec. 1337.)

It is also a rule of construction of a gift to a class that only those are included who are in existence at the time of the distribution. (Gray on Perpetuities, sec. 698.) It is also true that the word "issue" ordinarily means descendants to any degree. (Jarman on Wills, 109.) All these rules point to the one conclusion, and that is against the position of the appellant. In my opinion, the language of the will, independently of these rules of construction, clearly manifests the same intent. The property was to be held for the period, and the trustee is directed to divide the residue in equal shares among such of the testator's children as may then be living and the issue of any deceased child, such issue to share in the distribution *per stirpes*, and not *per capita*. If any child were to die before the testator, leaving issue, such issue would take the share that his or her parent would have taken.

Evidently, the testator intended to keep the property in his family, and beyond the power of his descendants to dispose of for the prescribed period. He has used language which, understood in its usual and ordinary sense, would have accomplished the purpose had it been possible under our law to do so. In case of doubt, the courts will presume that a violation of law was not intended, and will interpret the language so as to make a lawful trust, if possible. That cannot be done here.

Issue who might have taken under the trust, but who did not

survive until the appointed time for the distribution, are not then issue of the testator. I see no reason for supposing that the word "issue" means children. There was no direction to distribute to the heirs of the issue, and that might have been necessary under the interpretation suggested by the appellant. There might be a widow of a deceased grandchild, who would have been a beneficiary had he lived. She would not come within the class designated, but she would be entitled to a share as heir under the construction contended for.

I think it obvious that the testator did not intend this, and such result can only be brought about by construing the language used by the testator against the rules of construction usually applied to such instruments.

I think, therefore, the case is within the prohibition of the statute and is controlled by the rule announced in *Estate of Walkerly*, 108 Cal. 637; 49 Am. St. Rep. 93.

If this conclusion is correct, it is not necessary to discuss the other objection urged, that the attempted trust was for purposes not authorized by the statute.

The order and judgment are affirmed.

Henshaw, J., and McFarland, J., concurred.

Hearing in Bank denied.

[L. A. No. 281. Department Two.—December 27, 1897.]

E. J. DURRELL, Appellant, v. P. W. DOONER, Respondent.

STREET WORK REQUESTED IN FRONT OF LOT—LIEN CONFINED TO CITY OR TOWN—INSUFFICIENT COMPLAINT —DEMURRER — UNCERTAINTY. — The lien provided for in section 1191 of the Code of Civil Procedure, in favor of one who, at the request of the owner of a lot, improves the street or sidewalk in front of or adjoining the same, can be acquired and enforced only against a lot in an "incorporated city or town;" and a complaint to enforce such lien, setting forth a contract for grading and other work, which shows upon its face that the work was to be done outside of any city or town, and was to be done in accordance with an ordinance to be passed by the board of supervisors of the county, does not state a cause of action; and if such complaint leaves it uncertain whether the work to be done un-

der the contract was within an incorporated city or town, and uncertain as to whether an ordinance was passed by the board of supervisors of the county, it is subject to a demurrer for uncertainty.

Id.—OMISSION TO REQUEST AMENDMENT—OBJECTION UPON APPEAL.—

The omission to request an amendment to a pleading after a demurrer thereto has been sustained precludes the making of an objection upon appeal for the first time that the court should have allowed an amendment, when nothing appears in the record to show an abuse of discretion.

APPEAL from a judgment of the Superior Court of Los Angeles County. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

E. E. Bacon, for Appellant.

M. C. Hester, for Respondent.

McFARLAND, J.—This action was brought to enforce an alleged lien for twenty-four dollars and seventy-five cents upon certain land of the defendant for work done upon a street in front of said land in grading said street, curbing etc., under section 1191 of the Code of Civil Procedure. The defendant demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action, and also because it is uncertain in several named respects. The court sustained the demurrer without leave to amend, and judgment was entered for the defendant. Plaintiff appeals from the judgment.

The demurrer was properly sustained. The lien provided for in section 1191 can be acquired and enforced only against a lot in an "incorporated city or town"; and the whole complaint taken together shows, we think, quite clearly that the land with respect to which the alleged contract for grading was made was not within any incorporated city or town. The complaint set forth the written contract for grading and other work, and the contract shows upon its face that the work was to be done at a place in the county of Los Angeles outside of any incorporated city or town, or was to be done "in accordance with the ordinance to be passed by the board of supervisors of Los Angeles county." Moreover, the most favorable view that could be taken of the complaint would surely leave it uncertain as to whether the work to be done under the contract was within an incorporated city

or town, and also uncertain as to whether any ordinance was ever passed by the board of supervisors of the county, and uncertain as to other matters set forth in the demurrer.

The point that the court below should have allowed an amendment to the complaint does not properly arise here, because the appellant did not ask to amend. "The privilege of amending, after trial of issues of law raised by the demurrer, is not one of right, but one resting in the discretion of the trial court. (Code Civ. Proc., sec. 472.) If the plaintiff desired again to amend, she should have applied to the court below, and, if refused, exception should have been taken. It is too late to make the point for the first time in this court when nothing appears in the record to show an abuse of discretion." (*Buckley v. Howe*, 86 Cal. 605.)

The judgment is affirmed.

Temple, J., and Henshaw, J., concurred.

[S. F. No. 580. In Bank.—December 27, 1897.]

CHARLES K. McCLATCHY, Petitioner, v. SUPERIOR COURT OF THE COUNTY OF SACRAMENTO, A. P. CATLIN, Judge, Respondent.

CONTEMPT OF COURT—NEWSPAPER PUBLICATIONS—REPORT OF EVIDENCE—CRITICISM OF JUDGE—REFUSAL TO PERMIT EVIDENCE—EXCESS OF JURISDICTION—CERTIORARI.—Where a charge of contempt of court against a publisher of a newspaper alleged the making of publications therein, which were "false, scandalous, and defamatory," and "intended to degrade the said court, and excite public prejudice and odium against it, and were unlawful interferences with the proceedings of the court," and it appears that an account of testimony given in a pending cause was published therein, and that the judge upon his attention being called thereto by an attorney in the cause, stated from the bench that it was a grossly false and fabricated statement, whereupon the newspaper reasserted the truth of the account and declared that the attorney and judge knew it was correct, and severely criticised the judge, and expressed contempt for him for approving "the unmitigated falsehood of an attorney;" and where the defense to the charge of contempt of court was that the publications were in fact true, and not made with any wrongful intent, and that the personal references to the judge were merely in response to his asper-

sions in characterizing the statements in the newspaper as false and fabricated, when they were in fact true, and that such references were not made with purpose of interfering with the administration of justice; and where the publications were admitted to have been made, and the only testimony in support of the charge was that of the court reporter, to the effect that the matter published did not correspond with his notes of the evidence, and that prior to the second publication he had furnished to the publisher a correct transcript of his notes; and the judge refused to permit the publisher to introduce evidence to prove the truth of the account of evidence published, *held*, that an order adjudging him guilty of contempt of court was in excess of jurisdiction, and should be annulled upon *certiorari*.

ID.—PUBLICATION OF TRUTH AS TO LEGAL PROCEEDINGS—CRITICISM OF JUDGE, WHEN NOT A CONTEMPT OF COURT.—The publication of the truth as to legal proceedings or the criticism of a judge, if made only in response to an unjust charge upon the veracity of the publisher, and without intent improperly to influence the proceedings of the court, does not constitute a contempt of court.

ID.—ASPERIONS BY JUDGE FROM BENCH—RIGHT OF DEFENSE.—A judge on the bench has no more right than any other person to cast aspersions upon the character of a person not a party or participant in a case on trial, without a right in the latter to defend himself.

CERTIORARI in the Supreme Court to annul an order of the Superior Court of Sacramento County, adjudging the petitioner guilty of contempt. A. P. Catlin, Judge.

The facts are stated in the opinion.

P. Reddy, Delmas & Shortridge, John E. Richards, and Garrett McEnerney, for Petitioner.

S. S. Holl, and A. P. Catlin, for Respondent.

VAN FLEET, J.—*Certiorari* to review an order of the respondent adjudging petitioner guilty of contempt.

While the cause of *Talmadge v. Talmadge* was on trial in the superior court of Sacramento county, an article appeared in the *Sacramento Bee*, a newspaper published in the city of Sacramento, purporting to be an account of certain testimony given by one of the witnesses; and when, at the opening of court next day, its attention was called to the article by one of the attorneys in the cause, the judge stated from the bench that he had no hesitation in saying that the statement referred to was a grossly false statement, a gross fabrication, and that there was not the slightest ground in the testimony of the witness upon which such

a statement could be based. In the afternoon of that day the *Bee* published in its editorial columns the following article:

"The *Bee* will not keep in its employ a reporter who garbles or who misstates, but when a newsgatherer does his duty and tells the truth it will not stand silently by while an aggregation of attorneys try to make him out a liar, and while a prejudiced and vindictive czar upon the bench aids and abets them in such a purpose. The *Bee* reasserts that in all material details the statement of Talmadge, as given in the *Bee* of yesterday, was the statement that he made upon the stand at Monday afternoon session. The *Bee* will go further than that. It will declare that both the attorney before the bar and the judge on the bench knew that the statement made in the *Bee* was an essentially correct epitome of the testimony given by Mr. Talmadge, at the very moment when they unhesitatingly, shamelessly, and brazenly declared it to be a gross fabrication. There is no paper anywhere that has a higher regard for fair and impartial courts than has the *Bee*, but there is no paper anywhere that has a supremacy of contempt than has the *Bee* for a judge who will approve the unmitigated falsehood of an attorney, as Judge Catlin to-day approved the brazen misstatement of Judge J. B. Devine." Similar language was repeated in the columns of the newspaper on the two succeeding days. The petitioner herein is the editor and one of the proprietors of the *Bee*, and on June 2, 1896, upon an affidavit of Mr. C. T. Jones setting forth these publications and that the same was an interference with the proceedings of the court in the trial of the cause, and constituted a contempt of said court, a citation was issued directing him to show cause why he should not be punished for said contempt. In obedience to the citation, the petitioner appeared in court and filed an answer acknowledging that the article was published by his authority and justifying its publication upon the ground, among others, that it was in fact a correct report of the proceedings at the trial, and that it was published in order to defend himself from the charge made by the judge of the court, and in his answer repeated the charges made in the article published. Upon the hearing of the charge, the court found the facts in accordance with the affidavit of Mr. Jones, and that the publications were an unlawful interference with the proceedings of the court in the

trial of the cause, and adjudged the petitioner guilty of the contempt alleged, and that he pay a fine of five hundred dollars. The petitioner seeks by this proceeding a judgment annulling this order of the superior court.

There is but one point which need be considered. It is contended, and we think correctly, that the order under review is void for the reason, clearly disclosed by the record, that the petitioner was denied his constitutional right to be heard in his defense. The charge against him was in making certain publications in his newspaper relating to the evidence in the case on trial, alleged in the affidavit upon which he was cited to be "false, scandalous, and defamatory," and which "were intended to degrade the said court and excite public prejudice and odium against it and were unlawful interferences with the proceedings of said court." The *gravamen* of this charge was the alleged false character of the publications and the wrongful intent of petitioner in making them to bring the court into contempt, and thus interfere with the orderly administration of justice in the cause on trial. That this was the understanding and theory of the prosecution is shown by the course of proceeding in the court below. To prove the false character of the matter published by petitioner, the prosecution introduced the court reporter, who testified that the matter published, purporting to be a statement of the evidence as given in the action on trial at the time, did not accord with his notes of such evidence; and to show that petitioner acted with malicious intent it was proved by the reporter that before the second publication appeared he had furnished to petitioner what purported to be a correct transcript of his notes of that portion of said evidence to which the publication referred. This was substantially the case of the people, the publications being admitted. The substantive defense was that the publications were in fact true, and not made with any wrongful intent; that the personal references therein to the judge were merely in response to the aspersion of the latter cast upon petitioner in characterizing the statements in his newspaper as false and fabricated, when in fact they were not, and that such personal references were not made for the purpose of interfering with the administration of justice. That this was a complete defense, if sustained by evidence, there can, we think,

be no doubt. The publication of the truth as to legal proceedings is not a contempt of court (*In re Shortridge*, 99 Cal. 526); and the criticism of the action of the judge, if made only in proper response to an unjust charge against petitioner's veracity, and without intent to improperly influence the proceedings of the court, would not be contemptuous. It is said that the language of the judge was not directed at petitioner, but to the reporter on his paper; but we do not think the language will justly bear this limitation. A judge on the bench no more than any other can cast aspersions upon the character of a person not a party or participant in a case on trial, without a right in the latter to defend himself. Petitioner might not have been able to establish this defense, but he was not permitted to make the effort. When the case of the people rested this occurred:

"Mr. Reddy.—We want to call witnesses to show that the publication in the '*Bee*' was in point of fact true.

"The Judge.—I will not hear testimony further than what has already appeared on that subject, as stated by the reporter. I will not allow this matter to degenerate into a controversy as to the correctness of the reporter's notes.

"Mr. Reddy.—Then we will not be allowed to introduce any evidence at all—is that the proposition—if these notes are to be taken as correct?

"The Judge.—I shall act only on the official notes, as given you by the reporter. I will hear no other testimony.

"Mr. Reddy.—We wish to show that the notes are not correct, in so far as they differ from the report in the '*Bee*,' and that the testimony as reported in the '*Bee*' was actually given on that occasion.

"The Judge.—I will not hear any outside testimony other than the notes of the official reporter. . . .

"Mr. Reddy.—Your honor will allow no testimony except the reporter's notes?

"The Judge.—No.

"Mr. Reddy.—Then your honor will not permit us to put in evidence the subject matter—the allegations of the answer?

"The Judge.—I have made my ruling that I will hear no testimony in regard to the evidence that was taken there except what is contained in the notes of the official reporter, and they

have been fully given, and I will add to that the cross-examination of Mr. Duden [the reporter] with respect to those questions that the court asked him in regard to the time when he delivered the transcribed notes to the 'Bee.'"

Thereupon the defendant offered and requested to be allowed to introduce evidence in support of the various subdivisions of his answer, involving as a whole the same general issues as suggested above, but was denied such right, except to the extent that he was told he would be allowed to show that the publications were "without malice." This privilege was declined as of no avail unless petitioner was allowed to put in his entire defense.

That the result of this action of the court in thus requiring petitioner, in effect, to submit his defense upon the evidence for the people, was, in substance and effect, to deprive petitioner of the right to be heard in his defense, is, we think, obvious. It is contended by respondent that, even if the action of the court was wrong, it was error merely, which cannot be reviewed on *certiorari*; that the court having jurisdiction of the person and subject matter, the mere method in which it exercised such jurisdiction cannot be inquired into in this proceeding, which looks only to the question of jurisdiction. If the premise were correct, the conclusion would undoubtedly follow. But with the view that the action involved no more than mere error we cannot coincide. It was error, certainly, but it was more than that. It was a transgression of a fundamental right guaranteed to every citizen charged with an offense, or whose property is sought to be taken, of being heard before he is condemned to suffer injury. Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure, which has the effect to deprive one of a constitutional right, is as much an excess of jurisdiction as where there exists an inceptive lack of power. "The substance and not the shadow determines the validity of the exercise of the power." (*Postal Tel. etc. Co. v. Adams*, 155 U. S. 689, 698.)

While the writ of *certiorari* is not a writ of error, "it is nevertheless," as suggested in *Schwarz v. Superior Court*, 111 Cal. 112, "a means by which the power of the court in the premises

can be inquired into; and for this purpose the review extends not only to the whole of the record of the court below, but even to the evidence itself, when necessary to determine the jurisdictional fact."

If, then, by looking at the evidence we can see that the court exceeded its power, we have a right to examine the evidence for that purpose. The evidence and proceedings in this case disclose clearly to our minds such an excess. Contempt of court is a specific criminal offense (*Ex parte Hollis*, 59 Cal. 408; *Ex parte Gould*, 99 Cal. 360; 37 Am. St. Rep. 57); and a party charged therewith, although the proceeding is more or less summary in character, has the same inalienable right to be heard in his defense, especially in instances like the present, of mere constructive contempt, as he would against a charge of murder or any other crime. On this subject it is said in *Rapalje on Contempts*, section 111: "Contempt of court is of two kinds—that which is committed in open court, and that which is committed out of the view and hearing of the court. For the punishment of the first, by commitment and fine, no proceeding need be taken contradictorily with the offender, but for the punishment of the latter, by the same means, the offender must be allowed to offer evidence and argument in his defense, otherwise any judgment which the court may pronounce will be absolutely void."

In *State v. Orleans Civil Judges*, 32 La. Ann. 1256, 1262, considering a case of constructive contempt, it is said: "The charge of contempt should not in any case be followed by sentence and imprisonment unless after a rule to show cause has been granted, and the party defendant therein heard and permitted to offer evidence and argument." And it is held that anything less than that would constitute a want of "due process of law," or a proceeding not in accord with the "law of the land," rendering the judgment void. And the court there quote with approval this justly celebrated definition of the phrase "law of the land" formulated by Mr. Webster in the Dartmouth College case: "By law of the land is most clearly intended the general law, which hears before it condemns, which proceeds from inquiry and renders judgment only after trial. The meaning is, that every citizen shall hold life, liberty, property, and immunities under the protection of general rules which govern society."

And in the very recent case of *Hovey v. Elliott*, 167 U. S. 409, decided by the supreme court of the United States, where, in a civil action, the court had stricken out the answer of a party because of his contempt of an order requiring him to pay money into court, and rendered judgment against him *pro confesso*, it was held that the act was beyond the power of the court, for the reason that it deprived the party of the right to be heard in his defense; and that the judgment so entered against him was void, even as against collateral attack. Among other things it is there said: "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, could it be pretended that such an enactment would not be violative of the constitution? If this is true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under the express legislative sanction would be violative of the constitution? If such power obtains, then the judicial department of the government, sitting to uphold and enforce the constitution, is the only one possessing a power to disregard it. If such authority exists, then, in consequence of their establishment to compel obedience to law and enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."

And, as showing that it is not sufficient that the court shall go through the mere form of citing a party to appear upon the pretense of giving him a hearing while in fact denying him the right in its substance, it is there said: "Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. The denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to the party,

appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard." And, quoting from *Galpin v. Page*, 18 Wall. 350, it is said: "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

These considerations make it manifest that petitioner at his trial in the court below was denied that "due process of law" requisite to a valid conviction; and for that reason the order convicting him of contempt must be annulled.

It is so ordered.

Garoutte, J., concurred.

McFARLAND, J., concurring.—I concur in the judgment annulling the order under review. The case is a very close one; but I think that the alleged contempt rested ultimately upon the asserted fabrication and publication by petitioner of false testimony and his persistency in restating this version of the same as true. This being so, he should have been allowed to introduce such evidence as he had to the point that his publication of the testimony was a fair and correct statement of it. The court declined to hear any evidence from him on that subject; and the weight of authority is to the point that this ruling, being a denial of appellant's right to make a defense, goes to the jurisdiction and is reviewable on *certiorari*. If petitioner had been allowed to introduce the offered evidence the case would have presented no difficulties.

BEATTY, C. J., concerning.—A cause being on trial in the superior court, a newspaper publishes what purports to be a portion of the testimony of one of the parties to the action.

The attention of the judge being called to the publication, he pronounces it grossly false from his seat on the bench. The publisher in the next issue of his paper, and while the cause is

still on trial, reasserts the correctness of his report and in coarsely vituperative terms retorts upon the judge the accusation of falsehood. Is this a contempt of court?

The answer to this question depends, it seems to me, upon the further question, whether or not the judge, in denouncing the original report, was acting in a judicial capacity.

A true report of the proceedings of a court is not a contempt. A false report may or may not be a contempt according to circumstances. If a false report is published under such circumstances as to constitute a contempt, there is but one way to deal with the matter judicially, and that is by a regular citation or attachment and a hearing. If the court or judge undertakes to act upon the matter in any other way, his action is extrajudicial and not in his official character.

Such, it seems to me, was very clearly the case here. The attention of the judge being drawn to this publication, it was natural, and no doubt commendable, that he, believing it to be gross perversion of the facts, should so characterize it, but in so doing he was not acting as a court or judge. What he said was in no sense a part of any judicial proceeding, and the fact that he was seated on the bench at the time makes the case no different in point of law from what it would have been if his remarks had been delivered on the street or communicated in writing to the same or another newspaper.

The report of the newspaper was, therefore, not an attack upon the court or an interference with the proceedings of the court, but was an attack upon the man, for which, if it was malicious and unfounded, he had the same, and no other, means of redress that the law gives to every citizen who is the victim of a libel. The facts alleged and found in the proceeding against the petitioner do clearly establish a malicious libel, but they do not, in my opinion, constitute a contempt of court, and for that reason I concur in the judgment annulling the order.

HARRISON, J., dissenting.—Section 1209 of the Code of Civil Procedure declares that any unlawful interference with the proceedings of a court is a contempt of the authority of the court; and when facts are presented to the court which could under any circumstances have interfered with its proceedings

in the trial of a cause, it has jurisdiction to investigate the charge of contempt.

No question as to the general power of the court is presented in the present case. Its jurisdiction to investigate a charge of contempt is not denied. Whether it had jurisdiction to investigate the charge against the petitioner does not depend upon any review of evidence, but is to be determined by the sufficiency of the affidavit upon which the citation to him was issued. If the facts set forth in that affidavit are sustained, its powers to punish for the contempt therein charged follows as a legal conclusion. That the affidavit of Mr. Jones sets forth facts sufficient to give to the court jurisdiction to inquire into the alleged contempt, and to determine whether the acts charged against the petitioner had been committed by him, cannot be questioned, and the regularity of the procedure by which he was brought before the court is not challenged. The court, therefore, had jurisdiction to investigate the charge, and, after its jurisdiction had been thus acquired, any error by it in the course of the inquiry, either in admitting or in excluding evidence, is not the subject of review in this proceeding; and its finding of the facts upon which it based its judgment that the petitioner was guilty of contempt is also final.

It is claimed, however, by the petitioner, that the court had no jurisdiction to punish him for the contempt charged without giving him an opportunity to be heard in his defense, and that inasmuch as it refused to receive evidence which he offered at the hearing in support of certain matters which he had set up in his answer as a defense to the charge, and refused to consider these matters, it exceeded its jurisdiction in determining that he was guilty of the contempt charged in the affidavit. The right of one charged with contempt to be heard in answer to the charge is fully conceded; but upon this, as upon any other charge, his right to be heard is limited to matters that are pertinent to the issue before the court. If he is allowed a hearing upon these matters, he cannot say that he is deprived of his rights without due process of law. The provision in section 1217 of the Code of Civil Procedure that the court or judge must "investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses

for or against him," does not require the court to hear an answer whose allegations have no tendency to exonerate the person from the charge, or to permit an examination of witnesses upon matters that are not relevant to the alleged contempt. The court is to conduct the investigation under the sanction of its judicial obligations, but its determination therein will not be set aside upon the ground that it committed error in the course of the investigation. If the court had refused to allow the petitioner to file any answer to the charge, or if, after permitting his answer to be filed, it had ordered it to be stricken from the files, and had refused to receive any evidence on his behalf in defense of the charge, its judgment against him would have been unauthorized. Instead of so doing, however, the court permitted the petitioner to file such answer as he desired, and also heard all the evidence which he chose to offer in support of the matters therein which were material or relevant to the defense.

In his answer the petitioner had alleged that the original publication of the proceedings was a correct statement of the testimony given before the court, and the refusal of the court to allow evidence in support of this averment is claimed by him to have been a denial of the right to be heard in his defense; but the truth or falsity of this publication was not involved in the charge of contempt before the court. The contempt with which the petitioner was charged did not consist in this publication, but in the subsequent effort on his part to compel the court to accept it as the truth in opposition to its own statement that it was not correct. A false publication of the proceedings of a trial does not of itself constitute a contempt, or render its author liable to punishment. The charge of contempt against the petitioner was the fact that after the court had stated that the testimony contained in that publication had not been given, and while the cause was still in process of trial before it and undetermined, the petitioner had published in his newspaper, in a manner calculated to destroy the freedom of the court in determining the rights of the parties to the controversy then before it for determination, that this judicial declaration was false.

The court, therefore, very properly refused to permit the truth or falsity of the publication to be made an issue of fact

in the proceedings upon the charge of contempt; and it also properly denied the offer of the defendant to introduce the evidence given at the trial of the cause of *Talmadge v. Talmadge*, relating to other matters than those involved in the publication. Such evidence could have no bearing or relevance to the matter then under investigation.

The case of *Talmadge v. Talmadge* was on trial before the court without a jury. The court was required to make its findings of fact upon the testimony given before it, and to render its judgment in accordance with that testimony. When its attention was drawn to this publication, with a request by one of the attorneys in the case to be informed whether that was the testimony as understood by the court, and it stated from the bench in reply that such testimony had not been given, and that the publication was incorrect, this was a declaration by it that its decision was not in any way to be affected by what was stated in the publication to have been given as testimony in the case. If either of the parties had felt that the court was in error, it would have been proper to point out to it in any competent mode—either by the notes of the stenographer or by the statement of one who had heard it—that such testimony had in fact been given. The court, however, would not have been bound to accept such statement as correct, but would still be compelled to decide the cause upon its own view of what was the testimony therein, leaving it to the defeated party to show in any proper mode that it had decided contrary to the evidence. It is manifest from a mere reading of the article published in the "*Bee*" that it would naturally tend to interfere with the proceedings of the court in the trial of the cause to which it referred, and that the court was authorized to find that it was an unlawful interference with its proceedings. The evident purpose, as well as the natural tendency, of the article in question was to compel the court to accept the facts given in the previous statement in the "*Bee*" as the correct version of that portion of the testimony in the case, and was an attempt on the part of the petitioner to coerce the court into deciding the cause upon testimony which in its opinion had not been given; and to the extent that this publication might tend to bring about that result, whether it did in fact effect the purpose or not, it was an unlaw-

ful interference with the proceedings of the court. If the cause had been on trial before a jury, and the petitioner had approached one of the jurors and made the statements contained in the article, it would not be questioned that he would have been guilty of contempt. It is none the less a contempt that the testimony was to be considered by the court instead of by a jury, nor is the act constituting the contempt diminished by the fact that it was published in a newspaper rather than stated orally. It was published with the evident purpose that it should be read, and it was in fact read by the judge while the cause was still pending before him and undetermined.

The defendant also alleged in his answer that the publication set forth in the affidavit of Mr. Jones was published without malice and for the purpose of defending himself against the false charges made against him by the judge, and that he then believed that the original publication contained a correct statement of the evidence in the case. At the hearing, after the court had declined to allow any evidence upon the correctness of the original publication, the defendant proposed to offer proof in support of the several matters contained in his answer. The court gave him permission to show that the publication was made without malice, and that he believed it to be true, and also that he believed that he had a right to publish it, and to state his motive therefor. The court also stated that, if he could do so, he might show that the original publication was made from a report compiled by a reporter of the "*Bee*" from the testimony which he had heard in court. The defendant declined, to accept these offers, or to introduce any evidence upon these matters, his counsel saying: "We desire to put in our entire defense so that it may all go together." As the defendant was given an opportunity to present any evidence in his power relevant to the issue or material to his defense, it cannot be said that his trial was had contrary to the law of the land, or that he was convicted without a hearing.

The defendant's offer to prove by testimony that the publication did not interfere with the proceedings of the court was properly rejected. Whether the publication had such an affect or tendency was a question of law depending upon the nature of the publication and the circumstances under which it was

made, and was a question of law to be determined by the court, and not upon the testimony of witnesses.

The claim of the petitioner that by the article published he sought to justify himself against the implied charge of willful misrepresentation made by the court when its attention was first drawn to the statement of the testimony, falls to the ground in view of the fact that the court had made no reference to the petitioner, but assumed throughout its remarks that the publication had been made by reason of false and incorrect reports made by some one other than the petitioner. Whatever right the defendant might have to defend himself against what he deemed an unjust aspersion in these remarks of the judge, he had no right to do it in such a way as to interfere with the proceedings of the court. Unless courts are permitted to administer justice freely, and without being subjected to intimidation or coercion in their deliberations and decisions, they will be powerless to protect those who are injured, or to enforce the rights of those who invoke their aid.

It is contended by the petitioner that by reason of the following provision in section 1209 of the Code of Civil Procedure, as amended in 1891: "But no speech or publication reflecting upon or concerning any court, or any officer thereof, shall be treated or punished as a contempt of such court, unless made in the immediate presence of such court while in session, and in such a manner as to actually interfere with its proceedings," the court had no authority to adjudge him guilty of contempt. The effect of this provision was considered in *Shortridge's case*, 99 Cal. 526, 37 Am. St. Rep. 78, and it was said in that case: "No authority has been found which denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act—whether committed in or out of its presence—which tends to impede, embarrass, or obstruct the court in the discharge of its duties. It is a doctrine which is admitted in all its rigor by American courts everywhere, and does not need the support of foreign authorities based upon the fiction that the majesty of the king, represented in the persons of the judges, is always present in the court. It is founded upon the principle, which is coeval with the existence of the courts and as necessary as the right of

self-protection, that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence. It exists independent of the statute. The legislative department may regulate the procedure and enlarge the power, but it cannot, without trenching upon the constitutional powers of the court and destroying the autonomy of that system of checks and balances which is one of the chief features of our triple department form of government, fetter the power itself." (See, also, *Myers v. State*, 46 Ohio St. 473; 15 Am. St. Rep. 638; *State v. Frew*, 24 W. Va. 416; *Ex parte Barry*, 85 Cal. 603; 20 Am. St. Rep. 248; *People v. Durrant*, 116 Cal. 179.)

It is, however, contended by the petitioner that the constitution has conferred upon the legislature the right to thus limit the power of courts to punish for contempt of their authority. This proposition is maintained by the following argument: Section 1 of article XXII of the constitution provides: "That all laws in force at the adoption of this constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the legislature." The chapter of the Code of Civil Procedure relative to contempts was a law in force at the adoption of the constitution, and, not being inconsistent therewith, was, by virtue of this section, when the people voted for and adopted the constitution, adopted by them as a part and parcel of that instrument, and so continued until changed by legislation; that the amendment of 1891, having been enacted under the power implied in the clause "until altered or repealed by the legislature" is to be regarded as if the constitution had conferred express power upon the legislature to thus limit the power of the courts to punish for contempt. No such effect can be given, however, to the language of this section of the constitution. The legislature derives no greater power of legislation therefrom than is conferred upon it in article IV of the constitution, nor is the judicial department of the state deprived of any of its power by virtue of this section. The purpose and effect of the section was not to change the character of the laws therein referred to, or to give to them any different effect from that which they previously had, but the section was placed in the constitution for the purpose of avoiding any question of im-

plied repeal of any existing laws that were not inconsistent with the constitution, or, as is expressed in the preamble to the section, "That no inconvenience may arise from the alterations and amendments in the constitution of this state."

The order of the superior court should be affirmed and the writ discharged.

Temple, J., and Henshaw, J., concurred in the dissenting opinion.

Rehearing denied.

[Sac. No. 212. In Bank.—December 27, 1897.]

LURENNA MOORE, Respondent, v. R. H. COPP, Appellant.

ACTION TO QUIET TITLE—DEFENSE OF WRITTEN CONTRACT—FAILURE TO DENY GENUINENESS AND EXECUTION—EVIDENCE—MATTER IN AVOIDANCE OF CONTRACT.—The failure of the plaintiff, in an action to quiet title, to file an affidavit denying the genuineness and due execution of a written contract pleaded and set forth in the answer by way of defense, merely admits that the instrument pleaded is not spurious or counterfeit, or of different import on its face from the one executed, but is the identical instrument executed by the plaintiff, and does not preclude the plaintiff from controverting the instrument by evidence of fraud, mistake, undue influence, or any matter in avoidance of the contract, not inconsistent with the fact of its execution and genuineness.

ID.—ISSUES AGREED UPON—OBJECTION UPON APPEAL.—Where issues as to matter in avoidance of the contract pleaded in defense, not involving its genuineness and due execution, were agreed upon and submitted to the jury without objection, the defendant cannot object upon appeal for the first time that such issues were not properly submitted.

ID.—PLEADING—FRAUD OR MISTAKE IN AVOIDANCE—REPLICATION AS MATTER OF LAW.—A plaintiff is not required to plead the facts constituting fraud or mistake, unless the cause of action or defense to a cross-complaint rests thereon; and where such facts are merely matter in avoidance of a defense set up in the answer, they are not required to be averred in the complaint, but may be proved in rebuttal of the defense without a replication, which is supplied by operation of law.

ID.—EQUITY CASE—VERDICT OF JURY ADVISORY—RIGHT OF COURT TO DETERMINE QUESTION OF FRAUD.—An action to quiet title, in which the defendant relies upon a contract for the sale of the premises in controversy, is purely an equity case, in which neither party has the right to demand a jury, and the verdict of a jury is merely advisory to the court, and, though actual fraud in avoidance of the

contract is always a question of fact, yet the court is not bound by the verdict of the jury on that question, but may determine it regardless of the verdict.

ID.—MISTAKE OF FACT UPON PART OF PLAINTIFF—IGNORANCE OF PLAINTIFF—AGE, INFIRMITY, AND INEXPERIENCE—RELIANCE UPON DEFENDANT—KNOWLEDGE OF DEFENDANT.—A contract may be set aside for a clear mistake of fact on the part of one of the parties, without proof of fraud of the other party; and where the evidence for the plaintiff showed that she was aged, subject to physical infirmities, and inexperienced in business, and had confidence and implicit trust in the defendant, who prepared the contract out of her presence, and brought it to her to be executed, bringing with him a notary and a witness, and, knowing that she did not know what was contained in the contract, did not read it to her, and that she signed it, without reading it, under the understanding and belief that it was a lease with an option of renewal, and in ignorance of the fact that it contained a contract of sale, the circumstances are such that ordinary prudence on the part of the defendant required him to have the contract read in her hearing, and the plaintiff should not be held to suffer for her apparent laches in signing it in ignorance of its contents.

ID.—FINDINGS—PROBATIVE FACTS—ISSUES RENDERED IMMATERIAL.—A finding of probative facts is sufficient when the ultimate facts follow therefrom; and when the findings show a clear case of mistake of fact upon the part of the plaintiff, whether involving fraud therein or not, a separate finding upon the question of actual fraud is not required; and it is immaterial whether other findings are or are not sustained by the evidence.

ID.—IMMATERIAL ERROR—EVIDENCE.—Error in the admission of evidence upon other matters not involving the question of mistake of fact upon which the judgment for plaintiff proceeds is without injury.

ID.—PRIMA FACIE CASE OF MISTAKE—CONFLICT OF EVIDENCE.—Where the evidence for the plaintiff standing alone establishes a prima facie case of mistake, and the trial judge accepted her evidence as true, though contradicted by the evidence for the defendant, the appellate court is not at liberty to inquire into the relative weight of the conflicting evidence.

APPEAL from a judgment of the Superior Court of Placer County. J. E. Prewitt, Judge.

The facts are stated in the opinion.

John M. Fulweiler, and George C. Sargent, for Appellant.

A. M. Johnson, and L. L. Chamberlain, for Respondent.

CHIPMAN, C.—Action to quiet title to certain land on which was a granite quarry. Defendant answered the complaint and set up an instrument executed by plaintiff to him September 25, 1889, by which plaintiff agreed to sell and convey to defendant

the portion of the land containing said quarry, at the expiration of a certain lease, under which the quarry was being worked, which did not expire until 1901. The consideration of the contract was one dollar paid and one thousand dollars to be paid at the expiration of said lease. Plaintiff did not serve and file an affidavit denying the contract. A jury was impaneled to try certain four special issues, to wit: 1. Mental competency of plaintiff to make the contract; 2. Whether it was executed under undue influence of defendant; 3. Through fraud; 4. By mistake. Defendant made no objection to calling the jury nor to the submission of the issues. The jury answered the first three questions, No; the fourth, Yes.

Judgment passed for plaintiff quieting her title and adjudging defendant's contract void and annulling the same, from which and from the order denying his motion for a new trial defendant appeals.

Plaintiff proved title in her and rested. Defendant moved to instruct the jury to render a verdict for defendant upon the issues framed, on the ground: 1. That the burden of proof was on plaintiff, under the pleadings as they stood, to prove that defendant's claim was without right; and 2. That defendant set up in his answer a written instrument, executed by plaintiff, showing his interest in a portion of the premises, and that by section 448 of the Code of Civil Procedure, plaintiff not having filed and served the affidavit of denial therein required, the genuineness and due execution of the instrument are deemed admitted. The motion was denied, and defendant offered the instrument, which was admitted, and rested. Plaintiff thereupon offered evidence in support of the special issues framed, to some of which evidence defendant objected on the grounds: 1. That the genuineness and due execution of the instrument are admitted and cannot be controverted; and 2. As to some of the matters referred to in the special issues that they had not been pleaded.

It is claimed by respondent: That by the provisions of section 462 of the Code of Civil Procedure the answer is deemed controverted, and therefore respondent was not precluded from introducing evidence in avoidance of the contract under the special issues or otherwise.

1. The cases in which section 448 has been construed are numerous. The result reached may be briefly stated as follows: Where the defendant has pleaded a written instrument in defense (not by way of cross-complaint), and the plaintiff has not served and filed an affidavit denying the instrument and has offered no evidence controverting it on any ground, the instrument is to be deemed admitted and must be taken for what it appears on its face to be. But the plaintiff may controvert the instrument by evidence of fraud, mistake, undue influence, compromise, payment, statute of limitations, estoppel, and the like defenses, under section 462 of the Code of Civil Procedure. In short, he may by evidence controvert the instrument upon any and all grounds, except that he cannot controvert its due execution nor its genuineness. By genuineness is meant nothing more than that it is not spurious, counterfeit, or of different import on its face from the one executed, but is the identical instrument executed by the party. (*Sloan v. Diggins*, 49 Cal. 38; *Crowley v. City R. R. Co.*, 60 Cal. 628; *Fox v. Stockton etc. Works*, 73 Cal. 273; *Petersen v. Taylor*, 34 Pac. Rep. 724 (not in Reports); *In re Garcelon*, 104 Cal. 570; 43 Am. St. Rep. 134; *Carpenter v. Shinnors*, 108 Cal. 359; *Rosenthal v. Merced Bank*, 110 Cal. 198.)

It could never have been intended that the plaintiff is required to make an affidavit denying the instrument, or be precluded from making any defense whatever. There are many defenses which he is, and should be, entitled to make while possibly compelled to admit that he executed the instrument and that it is genuine; and which defenses it was intended by the code he might make under section 462. The court properly denied appellant's motion. There had been certain issues agreed upon and submitted to the jury without objection, not involving the genuineness and due execution of the contract. Appellant cannot now for the first time be heard to say that they were not properly submitted. (*In re Garcelon, supra.*)

2. But it is strongly urged by appellant that the defense indicated in the special issues was improperly allowed because not alleged in the complaint. (Citing *Wetherly v. Straus*, 93 Cal. 283, and *Burris v. Adams*, 96 Cal. 664, and some other cases.) Respondent claims that, under section 462, she was not called upon to plead matters in defense to answer, but that she could

offer evidence upon any defense in avoidance. (Citing *Colton etc. Co. v. Raynor*, 57 Cal. 588; *Rankin v. Sisters of Mercy*, 82 Cal. 88; *Grangers' etc. Assn. v. Clark*, 84 Cal. 201; *Williams v. Dennison*, 94 Cal. 540; *Sterling v. Smith*, 97 Cal. 343.)

Wetherly v. Strauss, *supra*, simply announced the universal rule that fraud is never to be presumed and must be pleaded when relied upon either in an action, or in a defense of an affirmative nature; but it does not reach the point now before us.

The cases cited by respondent, and other authorities not cited, we think fully sustain the proposition that, under our system of pleading, a replication to the answer has no place, but is supplied by operation of law through section 462 of the Code of Civil Procedure; and that all new matter in avoidance or constituting a defense or counterclaim must at the trial be deemed controverted. The only exception to this rule is found in section 442; where a cross-complaint has been served by the defendant claiming the affirmative relief therein mentioned, the party served "may demur or answer thereto as to the original complaint." Appellant is in error in his contention that the defendant in an action is placed upon the same footing by section 462 as is the plaintiff by section 437 as to pleading the issues. In the first instance the law requires the defendant to answer; but, when he has done so, the law in the other instance operates to make answer for the plaintiff without any replication on his part. The many cases decided show various issues thus permitted to be tried, such as: The statute of limitations, in *Curtiss v. Sprague*, 49 Cal. 301; want of consideration, in *Colton etc. Co. v. Raynor*, *supra*; undue influence, in *Rankin v. Sisters of Mercy*, *supra*; fraud, in *Sterling v. Smith*, *supra*. In the present case, plaintiff could not know, when she filed her complaint, that defendant would answer, nor that, if he did, he would claim under the instrument in question. After answer there was no pleading open to her under our system. (See, also, *In re Garcelon*, *supra*; *Pomeroy's Remedies and Remedial Rights*, secs. 587, 588.)

Burris v. Adams, *supra*, was peculiar in its facts, and was decided upon the theory that the defendant there had the clear record title, and that plaintiff's whole case depended upon fraud which he did not aver. The court say: "In the case at bar the defendant was the moving party. He bought, or had trans-

ferred to him, a lawsuit, and his only hope of winning it lay in the possibility of proving fraudulent acts which he did not aver. He knew from the start that the respondent McNeil had a perfect legal title which he could overthrow only by proving her guilty of a certain fraud; and he did not aver the fraud even in general terms."

The principle governing the case at bar is that stated in *Sterling v. Smith*, *supra*, where the court say: "No doubt when a cause of action rests upon fraud the facts constituting the fraud must be set up in the complaint; but such was not the case here, for the necessity of proving fraud appeared only after the answer of the defendant. And a plaintiff is in that position with respect to all new matters set up in the answer."

3. Appellant claims that the court was bound by the verdict of the jury; that fraud as a question of fact is always with the jury. Citing several cases and Wells' Questions of Law and Fact, page 238: "Actual fraud is always a question of fact." (Civ. Code, sec. 1574.) But it does not follow that it must always be determined by a jury. This is a pure equity case. The ownership and possession of plaintiff were admitted; and the case is not within those decisions which held that in an action which is essentially ejectment the right to a jury cannot be evaded by merely casting the complaint in another form. Therefore it was not the right of either party to demand a jury; nor is a court bound by the verdict of the jury in an equity case when one is called. (*Sweetser v. Dobbins*, 65 Cal. 529.)

4. Finding "f" is attacked as not justified by the evidence and as merely a recital of probative facts. The finding is in greater detail than need have been, but, if the ultimate facts stated follow from the probative facts, it is sufficient. The finding is quite lengthy, but may be briefly stated to be in effect, that respondent signed the instrument in question without reading it, believing it to be an agreement to give appellant an option to lease the premises upon the expiration of the subsisting lease and upon the same terms as the latter, whereas she in fact executed an agreement to sell the premises. The evidence is sharply conflicting upon this point, but the testimony of respondent is, that as she understood the proposition of appellant when first made to her, it was for an option to lease, and that when he

afterward brought the prepared paper for her to sign, she executed and acknowledged it without reading it or hearing it read, supposing it was prepared in accordance with the previous understanding on her part.

It does not appear that appellant made any statements to her, at the time the contract was signed, to mislead her, and but for the circumstances shown and the fact of her age, and physical infirmities, and inexperience in business, we should find some difficulty in bringing the case within section 1577 of the Civil Code, defining mistake of fact, from which relief will be given only when "not caused by the neglect of a legal duty on the part of the person making the mistake." Ordinarily, it would be the legal duty of a person about to sign a conveyance of real property, to read it or have it read or explained, or have an assurance from some one upon whose statements he had a right to rely that it was in accordance with the previous understanding of the party. We cannot say in the present case that the court erred in finding that respondent executed the instrument in question through "unconscious ignorance" that it was different from the instrument she had agreed to execute. The circumstances bring the case within the provisions of the Civil Code above cited. It must be borne in mind that the neglect of respondent to read the contract or have it read to her arose from thinking that it was as she previously understood it was to be; when she refused to have it read to her, stating that she knew what was in it, she so thought. Appellant knew its provisions, for he prepared it out of her presence and brought it to her to be executed, bringing with him a notary and a witness. Appellant knew that respondent did not know what was contained in the contract when she said she knew.

He knew that respondent had great confidence in him, and the court found that she trusted him implicitly. He also knew that she had no advisor and had consulted no one as to the nature of the contract. We think, under the circumstances surrounding the parties as disclosed by the evidence and as found by the court, that ordinary prudence on the part of appellant should have impelled him to insist upon having the contract read in her hearing at that time; and that respondent should not be held to suffer for her apparent laches and folly in signing the contract

in ignorance of its contents. It is not necessary that a mistake of fact should be mutual, as appellant claims. (Civ. Code, sec. 1577.) Nor is it true, as is contended, that a contract cannot be set aside for the mistake of one of the parties unless the contract was induced and the mistake arose from the fraud of the other party.

The rule as to the evidence is stated correctly in *De Jarnatt v. Cooper*, 59 Cal. 703, that where mistake (or fraud) is alleged, the party alleging it is bound to sustain his charge by clear and convincing evidence which standing alone establishes a *prima facie* case of mistake. If the evidence does not meet this test, this court may review the judgment on the ground of insufficiency of the evidence. Such a *prima facie* case is presented, we think, by the evidence of respondent.

5. Appellant claims that the issue of fraud was presented but was not found upon by the court, and that appellant was entitled to a finding upon it. If the judgment necessarily rested upon that issue in any material degree appellant's contention would be sound. But if the court properly decided the case upon other distinct issues not dependent upon the issue of fraud the latter became immaterial, and it was not error to omit a finding upon it, for the result would have been the same if the court had found this issue for defendant. (*Brison v. Brison*, 90 Cal. 323.) A mistake may arise without blame to either party; it may result from the misrepresentations of the party gaining thereby, in which case fraud would be involved, but it might be none the less mistake.

6. Findings "g" and "h" are assailed, finding "g" as not supported by the evidence, and finding "h" as not upon any issue in the case. Finding "g" is that plaintiff received no adequate consideration for said contract. Finding "h" is that the contract is not as to plaintiff just and reasonable, "the same purporting to require plaintiff to convey to defendant, for one thousand dollars only, property worth more than twice that sum, and the time of performance thereof being postponed more than twelve years after the execution of the contract."

It is not necessary to consider whether the objections to these findings are well taken or not, for, however erroneous, the judgment cannot be set aside inasmuch as it may rest upon finding "f." (*Brison v. Brison*, *supra*.)

7. Error is assigned in permitting plaintiff to testify to rents received by her for the quarry under the existing lease; also as to testimony upon the value of the quarry in 1889. Discussion of these matters would not be profitable, as we may concede error and still the evidence could not be said to affect defendant injuriously upon the issue of mistake, which is the real and only ground upon which the judgment does or can rest. Defendant's chief contention in the case was the alleged error in admitting any evidence to controvert the contract. His points were ably presented and have had full consideration. The trial judge accepted as true the evidence of plaintiff, and, although contradicted by the evidence of defendant, we are not at liberty to say the court erred. Under the oft-repeated rule we cannot inquire into the relative weight of the evidence where there is a conflict.

It is recommended that the judgment and order be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J.,	Harrison, J.,	Garoutte, J.,
Temple, J.,	Henshaw, J.	

Rehearing denied.

[S. F. No. 679. Department Two.—December 28, 1897.]

EDWIN A. WELLS, Petitioner, v. E. S. TORRANCE, Judge of the Superior Court of the County of San Diego, Respondent.

JUSTICE'S COURT—PROCEEDINGS SUPPLEMENTARY TO EXECUTION—ORDER TO DEBTOR NOT APPEALABLE—JURISDICTION OF SUPERIOR COURT — PROHIBITION.—An order made by a justice's court in proceedings supplementary to execution, requiring the judgment debtor to apply designated property to the satisfaction of the judgment, is not in the nature of a judgment, and is not appealable to the superior court; and the superior court and the judge thereof, having no jurisdiction of an appeal therefrom, will be restrained by writ of prohibition from this court from proceeding to try said appeal, and that court will be directed to dismiss the appeal.

PROHIBITION from the Supreme Court to the Superior Court of the County of San Diego. E. S. Torrance, Judge.

The facts are stated in the opinion.

George H. P. Shaw, for Petitioner.

C. H. Rippey, for Respondent.

HAYNES, C.—Petition for a writ of prohibition to restrain the respondent, as judge of the superior court, from proceeding to entertain an appeal from an order made in the justice's court under proceedings supplementary to execution. Wells, the petitioner, obtained a judgment against one Sidney Selover before a justice of the peace, execution was issued upon the judgment, and thereafter proceedings were duly taken for the examination of the judgment debtor under proceedings supplementary to execution, and an order was made therein against the defendant, requiring him to pay to the constable holding the execution the sum of forty-three dollars and fifty cents, that being one-half of the total sum of eighty-seven dollars, which last sum said justice found, as a matter of fact, was in the possession and under the control of said Selover at the time the order for his examination was served. Within thirty days after the making of said order Selover appealed therefrom to the superior court upon questions of both law and fact. Petitioner appeared specially in the superior court and moved to dismiss said appeal, on the ground that the superior court had no jurisdiction. Said motion was overruled by the court, and said appeal was set down for trial, and the petitioner asks that said superior court be prohibited from proceeding therein. The question involved is whether an appeal lies to the superior court from such an order.

Section 4 of article IV of the constitution fixes the appellate jurisdiction of the supreme court, but, by the following section, the appellate jurisdiction of the superior court is left wholly to the discretion of the legislature. No appellate jurisdiction is given to the superior courts by the constitution, but the legislature is permitted to give it such appellate jurisdiction as it may see proper.

Title 13 of the Code of Civil Procedure is devoted to appeals in civil actions. Chapter I of said title treats of appeals in general, chapter II of appeals to the supreme court, and chapter III of appeals to superior courts.

Section 936, the first section relating to appeals in general, provides: "A judgment or order, in a civil action, except when expressly made final by this code, may be reviewed as prescribed in this title, and not otherwise." The final section of this chapter, however (section 959), declares that "the provisions of this chapter do not apply to appeals to superior courts." Section 963, the first section of chapter II, entitled, "Of appeals to the supreme court," provides, among other things, for an appeal from any special order made after final judgment; but section 964 declares that the foregoing section does not apply in cases appealed from justices' police, or other inferior courts, except in certain specified cases, of which the case before us is not one.

Section 974, which is the first section of chapter III, entitled "Appeals to superior courts," is as follows: "Any party dissatisfied with a judgment rendered in a civil action in police or justice's court may appeal therefrom to the superior court of the county at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and, if from a part, what part, and whether the appeal is taken on questions of law or fact, or both."

This section is the only provision authorizing an appeal to the superior court from a justice's court.

The only point necessary to be determined is, whether the order made by the justice of the peace, under proceedings supplementary to execution, constitutes a judgment within the meaning of section 974 of the Code of Civil Procedure, above quoted. Section 715 of the Code of Civil Procedure, under which the proceedings were taken before the justice, provides that the judge may, by an order, require the judgment debtor to appear at a specified time and place to answer concerning his property, and section 719 of the same code provides as follows: "The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment."

These proceedings can only be taken after a judgment is rendered and an execution issued thereon.

Section 1003 of the Code of Civil Procedure defines an order as follows: "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion."

Section 577 defines a judgment as follows: "A judgment is the final determination of the rights of the parties in an action or proceeding."

The distinction between an order and a final judgment is clearly stated in *Loring v. Illsley*, 1 Cal. 28, and that case is followed and approved in *McGuire v. Drew*, 83 Cal. 225, 232, and *In re Smith*, 98 Cal. 636.

It is contended on behalf of respondent that what we have denominated an order is nevertheless a judgment; "that section 974 of the Code of Civil Procedure, which provides for appeals to superior court from justices' and police courts, in using the language 'any party dissatisfied with a judgment rendered in a civil action . . . may appeal therefrom to the superior court,' does not manifest any intention or purpose to select and designate the particular judgment from which an appeal may be taken, or to limit the meaning of the word 'judgment' so as to designate any particular action of a justice's court as constituting a judgment rendered within the meaning of the section." We think this construction cannot be sustained.

Section 936, of appeals in general, and which is expressly declared not to be applicable to appeals to superior courts, expressly provides for the review of "a judgment or order in a civil action," and section 963, providing for appeals to the supreme court, provides not only for an appeal from a final judgment, but from a large number of specially designated orders, and generally "from any special order made after final judgment;" whilst section 974, providing for appeals to superior courts, wholly omits all references to orders made by justices of the peace, or judges of police courts, whether made before or after the judgment in the action. This omission of all mention of orders is not only significant, but conclusively shows that the legislature did not intend to give an appeal from such orders. Besides, section 939 provides the time within which appeals may be taken from a judgment, and fixes a different time within which an appeal from an order shall be taken, whilst in appeals to the superior courts there are

no such provisions, the appeal being required to be taken from the judgment within thirty days.

The only provision made in the chapter relating to appeals to superior courts for a review of orders made in justices' or police courts is found in section 980, and is as follows: "Upon an appeal heard upon a statement of the case, the superior court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial."

The appeal, as we have seen, must be taken within thirty days after the rendition of the judgment, and the statement of the case must be made within ten days from the rendition of the judgment; and it is only when so taken within the time limited, and upon a statement of the case, that the superior court may review orders affecting the judgment appealed from, and thus, having jurisdiction of the case, may confirm or modify any or all of the proceedings subsequent to and dependent upon such judgment.

In this case the judgment was rendered against Selover December 26, 1895, the execution was issued February 29, 1896, and the notice of appeal was given on the 21st of March, 1896. Not only was there no appeal from the judgment rendered against Selover, but this appeal was taken long after the time limited for appeals from judgments.

Respondent cites *Bronzan v. Drobaz*, 93 Cal. 647, to the proposition that the action of the justice in this case in requiring Selover to pay to the constable the money found to be in his hands is a judgment. That case was a proceeding against a garnishee and not against the judgment debtor. The plaintiff had obtained judgment against a mining company to whom Drobaz was claimed to be indebted, and the fact that he was so indebted was determined in supplementary proceedings against the corporation, in which Drobaz was required to appear and answer. As to him it was an original proceeding, and, as was there said, "in effect, constituted a judgment." The distinction between an order made against a garnishee and one made against the judgment debtor is obvious. As against the garnishee, the order finds that he is indebted to the judgment debtor of the plaintiff in the

action; whilst in the case before us the judgment determined the liability of the debtor and the right of the plaintiff, and the order simply required the debtor to apply certain property toward its satisfaction.

The legislature has ample power to provide for an appeal from such orders as may be made by a justice of the peace after final judgment, but it has not done so. That an order made by a superior court in aid of an execution issued upon a final judgment, requiring the judgment debtor to apply designated property to the satisfaction of the judgment, is an order, and not a judgment, is beyond question; and, if so, the same order or direction made by a justice of the peace, under the same statute, for the same purpose, and having the same effect, cannot be denominated a judgment. It follows that the superior court has no jurisdiction to review the proceedings and order of the justice upon appeal therefrom, and that a writ of prohibition should issue restraining the said court and the judge thereof from proceeding or trying said appeal and that said appeal be dismissed.

Searls, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion, and upon the petition filed herein, let a writ of prohibition issue restraining said court and the judge thereof from proceeding to hear, try, or determine said appeal, and directing the said court to dismiss the same.

McFarland, J., Henshaw, J., Temple, J.

[S. F. No. 589. Department One.—December 29, 1897.]

A. H. LISSAK, Respondent, v. CROCKER ESTATE COMPANY, Appellant.

NEGLIGENCE—FALL OF ELEVATOR—EVIDENCE—DECLARATIONS OF PERSON IN CHARGE—RES GESTAE—NARRATIVE OF PAST OCCURRENCE—PREJUDICIAL ERROR—ESTOPPEL OF PLAINTIFF—APPEAL.—In an action for an injury received from the fall of an elevator, owing to the alleged negligence of the defendant, evidence of a conversation had by plaintiff with the person in charge of the elevator after it had stopped in its fall, in which in response to a question as to what had happened he declared that "he lost all control, and the connec-

tion cord got broke," is incompetent, the declaration being in its nature a narrative of a past occurrence, and no part of the *res gestae*, and such incompetent evidence, being of a character to charge the defendant with negligence, must be deemed prejudicial; nor can the plaintiff, after insisting upon the admission of the evidence over an objection to its admissibility, be permitted to defend his course by contending, upon appeal of the defendant, that the error was harmless.

ID.—TESTIMONY OF PHYSICIAN—WAIVER OF OBJECTION—IMPLIED CONSENT OF PATIENT—ERRONEOUS ORDER STRIKING OUT. — Where the plaintiff had testified that, after the fall of the elevator he was taken to the office of a physician, and gave testimony respecting the examination and treatment given him by such physician, and the physician was called for the defense and testified, without objection of plaintiff, respecting his examination of plaintiff and the remedies used, and the nature of his injuries, the failure of plaintiff to object thereto was a waiver of objection, and an implied consent to the evidence, which could not be revoked, and it was error for the court, upon plaintiff's objection to further evidence of the witness, upon the ground that he was disqualified, to strike out the evidence previously given by the physician, and to instruct the jury to disregard it.

REVIEW UPON APPEAL—AMENDABLE OBJECTION TO COMPLAINT—REVERSAL—NEW TRIAL.—Where the judgment is reversed and the cause remanded for a new trial, it is unnecessary to review and pass upon an objection to the complaint which may be obviated by amendment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. S. K. Dougherty, Judge.

The facts are stated in the opinion of the court.

Morrison & Foerster, for Appellant.

William H. Jordan, for Respondent.

HARRISON, J.—The plaintiff recovered a verdict against the defendant for personal injuries sustained by the fall of an elevator in which he was at the time a passenger. From the judgment thereon and an order denying a new trial the defendant has appealed. It is alleged in the complaint that the defendant operated and controlled the elevator, and that the same was wholly under its management and control, and was maintained by it for the purpose of carrying passengers to and from the different floors of the defendant's building; that at the time the injury occurred the plaintiff entered it to be thus carried, and the defendant undertook to transport him from the first to the fourth

floor of the building, and that while being so transported the cage of the elevator suddenly fell from about the third floor to the basement with great and excessive violence and rapidity, whereby the plaintiff sustained injury to the amount of five thousand dollars.

1. At the trial a witness on behalf of the plaintiff was permitted, against the objection of the defendant, to give a conversation which he had had with the man in charge of the elevator. His testimony was: "I asked him what in the world happened. He said he lost all control, and the connection cord got broke." This conversation was had after the elevator had stopped in its fall, and after the plaintiff had been taken out of the cage, and formed no part of the *res gestae* and should have been excluded by the court. It was only a statement of what had occurred, and the defendant was not bound thereby. In *Lane v. Bryant*, 9 Gray, 245, 69 Am. Dec. 282, the plaintiff was injured in a collision between his carriage and that of the defendant, and a witness was asked what the defendant's servant said to the plaintiff at the time of the accident, and while the plaintiff was being taken out of the carriage, to which he replied that the servant said that the plaintiff was not to blame. In holding that this evidence was improperly admitted, the court said: "The declaration of the defendant's servant was incompetent, and should have been rejected. It was made after the accident and the injury to the plaintiff's carriage had been done. It did not accompany the principal act on which the whole case turned, or tend in any way to elucidate it. It was only the expression of an opinion about a past occurrence and no part of the *res gestae*. It is no more competent because made immediately after the accident than if made a week or a month afterward." (See, also, *Richstain v. Washington Mills Co.*, 157 Mass. 538; *Beasley v. San Jose Fruit Packing Co.*, 92 Cal. 388; *Fetter on Carriers of Passengers*, sec. 454.) It cannot be said that this was an immaterial error. The evidence was incompetent, and, being of a character tending to charge the defendant with negligence, it is impossible to say what effect it may have had upon the jury. A party cannot, after insisting upon the admission of improper evidence over an objection to its admissibility, defend his course by contending that the error was harmless. (*Smith v. Westerfield*, 88 Cal. 374.)

2. The plaintiff testified that after the elevator fell he was taken to the office of Dr. Spencer in the same building, and also gave testimony respecting the examination and treatment given him by the doctor. Dr. Spencer was called as a witness by the defense, and without any objection on the part of the plaintiff, testified respecting his examination of the plaintiff and the remedies prescribed by him. He also stated that the plaintiff came back to him about two weeks later, and, an objection to his testimony in reference to that interview having been sustained by the court, he was then asked by the defendant's counsel his opinion, from what he saw at the examination on the day of the accident, as to the nature of the injury sustained by the plaintiff, to which he replied: "The injury did not impress me as a very serious one. It impressed me as being a moderate wrench of the articulation at the ankle joint—a moderate wrench of the ligaments which bind the ankle joint to the lower end of the leg." The defendant's counsel then asked him: "What would be your opinion, doctor, or what was your opinion, if you then had any, as to the probable effect of that then condition of Mr. Lissak?" Upon the objection of the plaintiff that, under section 1881 of the Code of Civil Procedure, the witness was disqualified from testifying, the court refused to permit an answer to this question. The court then, upon the motion of the plaintiff, struck out the previous testimony of the witness, and instructed the jury to disregard it, to which ruling the defendant excepted.

In this ruling the court erred: Section 1881 of the Code of Civil Procedure, subdivision 4, provides: "A licensed physician or surgeon cannot, without the consent of his patient, be examined in any civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." When Dr. Spencer was called as a witness the plaintiff had the right to object to his testifying upon the matters named in this section, or he could consent to his being examined in reference thereto. The privilege given by the statute is personal to the patient, and may be waived by him. It is waived when he calls the physician himself as a witness, or when he permits him to give his testimony without making any objection thereto. If the patient once consents to his testifying, he cannot, after the testimony has been given,

revoke the consent and ask to have it excluded. Such consent may be either implied or express, and there was in the present instance an implied consent when the plaintiff permitted the witness to be examined in full by the defendant without any objection. The testimony of the witness was not received through any mistake or inadvertence on the part of the plaintiff, or through any ignorance on his part that he was being interrogated respecting his treatment, or of the nature of what his testimony would be. The plaintiff in his own testimony had stated that he visited the doctor's office, and had been treated by him, and when the doctor was called as a witness by the defendant the plaintiff not only knew that he was to be examined in reference to the same matters, but before the witness had given his testimony the plaintiff's counsel requested and was granted permission to make a preliminary examination and to question the witness with reference to his examination of the plaintiff. It was the duty of the plaintiff, if he intended or desired to object to any further examination, to make his objection at that time, and not to wait until he had learned whether the testimony was favorable or unfavorable, and then ask to have it excluded. "The contestant could not sit by during the examination of the physicians and after their evidence had been elicited by examination and cross-examination, upon finding it injurious to her case, claim as a legal right to have it stricken out. There are bounds to the enforcement of the statutory provisions which will not be disregarded at the instance of a party who, being entitled to their benefit, has waived or omitted to avail himself of them. It is perfectly true that public policy has dictated the enactment of the code provisions by which the communications of patient and client are privileged from disclosure; but the privilege must be claimed, and the proposed evidence must be seasonably objected to. The rule of evidence which excludes the communications between physician and patient must be invoked by an objection at the time the evidence of the witness is given. It is too late after the examination has been insisted upon, and the evidence has been received without objection, to raise the question of competency by a motion to strike it out." (*Hoyt v. Hoyt*, 112 N. Y. 514.)

3. The defendant demurred to the complaint upon the ground

that it did not state facts sufficient to constitute a cause of action, and it is now insisted by it that its demurrer should have been sustained upon the ground that the complaint fails to allege in express terms that the injury was caused by its negligence, while the respondent contends that this objection to the complaint should have been pointed out by special demurrer, and also that the facts alleged by him sufficiently established negligence on the part of the defendant, and that upon proof of these facts he was entitled to judgment. As the cause is to be remanded for a new trial, it is unnecessary to determine this question, since the objection may be obviated by an amendment to the complaint.

The judgment and order denying a new trial are reversed, and the cause remanded with leave to the plaintiff, if he shall be so advised, to amend his complaint.

Garoutte, J., and Van Fleet, J., concurred.

[S. F. No. 642. Department One.—December 29, 1897.]

MARGARET TYNAN, Administratrix, et al., Appellants, v.
MARY KERNS et al., Respondents.

ESTATES OF DECEASED PERSONS—TIME FOR NOTICE TO CREDITORS—ALLEGED FRAUDULENT UNDERVALUATION—EQUITABLE ACTION BY CREDITOR AFTER DISTRIBUTION—LACHES — MEANS OF KNOWLEDGE. — A complaint in an equitable action brought by a creditor of the estate of a deceased person, after the final settlement and distribution of the estate, to annul all proceedings in the matter of the estate, subsequent to the return of the inventory, and to compel the administratrix to allow the plaintiff's claim, upon the ground that the estate had been fraudulently undervalued, and that the notice to creditors should have been published for ten months, instead of four months, and alleging that plaintiff had no actual or constructive notice of such undervaluation, or of the proceedings for the settlement of said estate, but not alleging ignorance of the death of the decedent, nor of the appointment of the administratrix, nor of the inventory filed, does not state a cause of action; but the plaintiff, notwithstanding the allegation to the contrary, is chargeable with the constructive notice of the proceedings, and, having had sufficient means of knowledge of the alleged undervaluation to be put upon inquiry, is chargeable with inexcusable laches, in not obtaining relief, if a fraud was being perpetrated, before the final settlement of the estate.

APPEAL from a judgment of the Superior Court of Santa Cruz County. J. H. Logan, Judge.

The facts are stated in the opinion.

George P. Burke, for Appellants.

Charles B. Younger, for Respondents.

CHIPMAN, C.—A demurrer to the complaint was sustained on the ground that it did not state facts sufficient to constitute a cause of action, and, plaintiff declining to amend, judgment passed for defendants, from which plaintiff appeals. It appears from the complaint that the defendants' intestate died in October, 1892, and on November 28th his surviving widow, one of defendants, was appointed administratrix of his estate, and on December 13th she returned her inventory and appraisement. The court made an order directing that publication of notice to creditors be made in the *Santa Cruz Daily Sentinel*, and it was so published from December 14 to January 17, 1893, and the next day the court made its decree that publication of notice had been duly made, limiting the time within which to present claims to four months; that the inventory showed real estate of the value of four thousand three hundred and sixty dollars, and personal property valued at three hundred and sixty dollars; that the real estate was community property, and that decedent had duly declared and recorded a homestead upon the same in 1884, for the benefit of his wife (one of defendants) and his family; that said administratrix filed her petition to have the said real estate set apart to her as a homestead, of the hearing of which notice was posted by the clerk of the court; and the court on December 27, 1892, granted the petition and set apart said real estate to her "in fee simple absolute"; that on July 7, 1893, the court made its decree distributing all the property of the estate, and on July 10, 1893, made its order discharging the administratrix from her trust; that on August 5, 1893, plaintiff presented her claim against said estate to said administratrix, who refused payment, whereupon, on August 21, 1893, plaintiff filed her complaint in this action. The action is brought to annul all the proceedings in the matter of said probate subsequent to the re-

turn of the inventory and to compel the administratrix to allow plaintiff's claim. The relief is sought on the ground of the alleged fraud of the administratrix in conducting the administration of said estate, by which the court was misled to make the several orders and decrees already mentioned, to wit, the order directing notice to creditors, the decree establishing notice to creditors, and the order setting apart said real estate as a homestead.

The specific fraudulent acts alleged may be briefly summarized as follows: That the administratrix falsely stated in her petition for letters the value of the real and personal estate to be five thousand dollars, when she knew the value of the real estate was "twenty-five thousand dollars and of the personal property two thousand dollars;" that she procured the appointment of appraisers who would and did, in aid of her design to defraud plaintiff, return the value of the real and personal property at five thousand dollars, the purpose being to mislead the court into making the notice to creditors four months instead of ten months; that she selected a newspaper in Santa Cruz in which to publish the notices required by law to be published for the purpose of concealing the fact of publication from plaintiff, who it is alleged did not take said paper, and that said paper was not one of general circulation in Watsonville, near which town plaintiff resided; that the court was misled in setting apart all the said real estate as a homestead through the said fraudulent undervaluation; that plaintiff had no actual or constructive notice of any of the said orders complained of, and had no actual or constructive notice that creditors were required to present their claims within four months, but she supposed that claims would not be barred for ten months after notice given to creditors, inasmuch as the said real estate was of the value of twenty-five thousand dollars, and was so known to be by said executrix and by the public at large in the neighborhood; that the first actual notice plaintiff had of said orders was when she presented her claim and learned that the estate had been finally settled.

Appellants rely upon the decision of this court in *Paterson v. Schmidt*, 111 Cal. 457, as decisive of this case, where it was held that notice given by an administrator to creditors is not conclusive upon them. In that case there had been no decree entered

establishing due publication of notice to creditors, and the estate had not passed to final distribution, as is the fact here. As to what this court may hold when the question is presented under such circumstances, we need not speculate, inasmuch as in the view we take of the case now before us this question is not necessarily involved.

If appellants have not by their complaint presented facts sufficient to entitle them to the relief prayed for, it becomes immaterial whether or not respondent gave due notice to creditors. We think they have failed, and that the demurrer to their complaint was properly sustained.

We do not think appellant can be heard to say that she had no notice of the various proceedings of which she complains. It is not alleged that she was ignorant of the death of decedent, nor that she was ignorant of respondent's appointment as administratrix, nor of the inventory filed by her. Appellant is, therefore, charged with knowledge, not only of the appointment, but of the petition upon which it was made and of the inventory. It is alleged that in this petition for letters respondent fraudulently understated the value of the property, as was also done in the inventory. Knowledge of the petition or the inventory put appellant in possession of the one fact around which, as it seems, all the alleged fraud revolves; to wit, that the property, real and personal, was claimed to be of no greater value than five thousand dollars, when in fact it was worth twenty-five thousand dollars.

It is alleged in the complaint that notice to creditors was published in the *Santa Cruz Daily Sentinel* from December 14, 1892, to January 17, 1893, and as respondent had a right to so publish it (Code Civ. Proc., sec. 1490) appellant is charged with constructive knowledge thereof. The same is true of the notice of hearing petition to set apart the homestead, the petition for distribution and its hearing and other proceedings, all of which appear to have been regularly taken. At any one stage of the proceedings, or at any time from the filing of the petition for letters to the final discharge of the administratrix, it was within the power of appellants to obtain relief, if a fraud was being perpetrated.

Having knowledge that letters had issued to respondent, ad-

ministratrix, upon a petition in which the entire property was valued at five thousand dollars, plaintiff was thus warned that the notice to creditors might, under the law (Code Civ. Proc., sec. 1491), require creditors to file their claims within four months from the first publication; there was no duty put upon the administratrix to give more than the statutory time, but there was a duty put upon appellant to take notice of the time. Plaintiff's allegation that she had no constructive notice is not an allegation that she had no notice. Constructive notice is such notice as is imputed by law (Civ. Code, sec. 18), as to the effect of which the court can judge, notwithstanding such notice is denied. We think that the actual notice which appellant had of the death of decedent, and the issuing of letters to respondent, administratrix, and the inventory, carried with it notice of circumstances sufficient to put appellant upon inquiry of the particular fact of which she complains, and she thus had "constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, she might have learned such fact." (Civ. Code, sec. 19.)

At all the various stages of the proceedings, at least until the final distribution of the estate, appellant had an adequate remedy had she exercised ordinary prudence and diligence in the protection of her rights. Equity will not relieve against culpable negligence or inexcusable laches. Ignorance of the alleged fraud will not excuse appellant's laches, especially as her ignorance may be directly traced to her. (*Hecht v. Slaney*, 72 Cal. 363.)

With the actual and constructive knowledge already pointed out, and with full opportunity for adequate redress, appellant should not be allowed to wait until after final distribution of the estate and the discharge of the administratrix, and then to seek relief from consequences the result of her own inexcusable neglect, and which, by the exercise of ordinary prudence, she could have averted. It was said by Mr. Justice Harrison in *Shain v. Sresovich*, 104 Cal. 402: "The rule is well established that the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine and inac-

tive, and afterward allege a want of knowledge that arose by reason of his own laches or negligence."

The judgment should be affirmed.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Harrison, J., Garoutte, J., Van Fleet, J.

[L. A. No. 357. Department One.—December 29, 1897.]

LOUIS LINOTT, Respondent, v. S. P. ROWLAND et al., Defendants. THOMAS ROWLAND, Appellant

JUDGMENT BY DEFAULT—SERVICE OF SUMMONS—INSUFFICIENT AFFIDAVIT—APPEAL.—An affidavit of the service of summons which fails to show any service thereof upon an appealing defendant, and upon which no charge of perjury could be sustained, no other proof of service appearing in the record, is insufficient to authorize the clerk to enter a judgment by default against him, or to sustain such judgment upon a direct appeal therefrom.

ID.—AMENDMENT OF COMPLAINT AFTER DEFAULT—VACATION OF DEFAULT—OMISSION OF SERVICE—SUPPORT OF JUDGMENT.—The filing of an amended complaint supercedes the original; and where the complaint is amended in matter of substance after the default of a defendant has been entered, it has the effect to vacate the default; and, if such amended complaint is not served upon the defaulting defendant, there is no pleading upon which a judgment against him can be sustained.

ID.—ORDER REFUSING TO QUASH EXECUTION—APPEAL—INSUFFICIENT RECORD—DISMISSAL.—An appeal from an order refusing to quash an execution issued upon a judgment by default will be dismissed, where the record contains no bill of exceptions relating to the order, and no stipulation from which it can be determined upon what papers the motion was heard.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing to quash an execution. W. H. Clark, Judge.

The facts are stated in the opinion of the court.

Reymert & Orfila, for Appellant.

Clarence A. Miller, for Respondent.

HARRISON, J.—The complaint herein is upon a promissory note purporting to have been made by four persons who are named as defendants in the action. Judgment by default was rendered against three of the defendants, from which one of them—Thomas Rowland—has appealed.

The affidavit of service of the summons and complaint upon the appellant is as follows:

“[Title of Court and Cause.]

“G. L. Wilson, being duly sworn, deposes and says: ‘I am, and was at the time of service of summons hereinafter mentioned, a white male citizen of the United States, over twenty-one years of age, and competent to be a witness on the trial of this action; that on the twenty-first day of December, 1895, at the county of Los Angeles, state of California, by delivering to, and leaving with said defendants, and to each of them a copy of said summons, a copy of the complaint filed in this action, certified by the clerk of said court.’

“G. S. FLEMING, Constable.

“By G. L. Wilson, Deputy Constable.”

Properly verified December 23, 1895.

As this affidavit fails to show any service upon the appellant, and is the only proof of service in the record, it is insufficient to sustain a judgment upon a direct appeal therefrom. (*McMillan v. Reynolds*, 11 Cal. 372; *Schloss v. White*, 16 Cal. 66; *McKinlay v. Tuttle*, 42 Cal. 577; *People v. Bernal*, 43 Cal. 385.) Upon this proof of service the clerk had no authority to enter the default of the appellant, and the judgment against him upon such default is erroneous. (*Reinhart v. Lugo*, 86 Cal. 395; 21 Am. St. Rep. 52.) The affidavit of service does not show that any copy of the summons or complaint was delivered to the appellant by Fleming, and a charge of perjury against him for making the affidavit would not be sustained by proof that such delivery was never made.

After the clerk had entered the default of the appellant the plaintiff filed an amended complaint, amended in matter of substance, but served the same upon only one of the defendants, and made no service thereof upon the appellant. The defendant upon whom it was served demurred thereto, and, his demurrer having been sustained, judgment was thereafter entered in his

favor. The amended complaint was filed February 10, 1896, and the judgment against the appellant was entered February 21, 1896.

The amended complaint superseded the original, and there- after the original complaint dropped out of the case and ceased to have any effect as a pleading or as the basis of a judgment, and had the effect to vacate the default of the appellant previously entered. (*Barber v. Reynolds*, 33 Cal. 497; *Schneider v. Brown*, 85 Cal. 205; *Collins v. Scott*, 100 Cal. 446.) An amended complaint must be served on all the adverse parties who are to be bound by the judgment, whether it materially affects them or not (*Elder v. Spinks*, 53 Cal. 293), and, as the amended complaint herein was not served upon the appellant, there was no pleading upon which the judgment against him can be sustained.

The appellant has also appealed from an order refusing to quash an execution issued upon the judgment, but the record contains no bill of exceptions relating to the order and no stipulation from which it can be determined upon what papers the motion was heard.

The order appealed from is dismissed and the judgment is reversed.

Garoutte, J., and Van Fleet, J., concurred.

[Sac. No. 264. Department One.—December 29, 1897.]

CHARLES HARRIS, Surviving Partner of Harris Brothers,
Respondent, v. W. H. COOK, Auditor of Merced County, Ap-
pellant.

DELINQUENT TAX LIST—AUTHORITY FOR PUBLICATION—ALLOWANCE OF ILLEGAL CLAIM BY SUPERVISORS—MANDAMUS TO AUDITOR.—The tax collector has no authority to contract for the publication of the delinquent tax list, and where the board of supervisors of the county did not contract for the publication thereof with the lowest bidder after ten days' public notice, in pursuance of section 3766 of the Political Code, such board has no authority to allow and approve a claim for the publication thereof by order of the tax collector, and *mandamus* will not lie to the auditor to compel the drawing of a warrant for such illegal claim.

APPEAL from a judgment of the Superior Court of Merced County and from an order denying a new trial. J. K. Law, Judge.

The facts are stated in the opinion of the court.

F. H. Farrar, J. F. Peck, and V. C. Frost, for Appellant

J. W. Knox, for Respondent.

GAROUTTE, J.—This appeal is prosecuted from a judgment directing that a peremptory writ of mandate issue to the auditor of Merced county, requiring him to draw a warrant for the sum of ninety-one dollars and fifty cents. At the request of the tax collector of the county of Merced, plaintiffs printed the delinquent tax list for the fiscal year 1894-95. They presented a claim for the work done to the board of supervisors of the county, and it was allowed and approved. This approved claim forms the basis of the application for the writ.

Among the findings of fact made by the trial court there is the following: "That the board of supervisors of Merced county did not contract for the publication of the delinquent list of taxes for said county for the year 1895 with the lowest bidder, or at all, or after ten days' notice, or at all, that such contract would be let, and did not receive any sealed proposals from any newspaper for publishing said delinquent list, or at any time after or before the twenty-eighth day of March, 1895, or after or before section 3766 of the Political Code was amended, on March 28, 1895." This finding of fact forms an absolute bar to plaintiffs' recovery. In the case of *Smeltzer v. Miller*, 113 Cal. 163, the question here presented was before the court, and the theory upon which plaintiff attempts to recover in this action is there declared entirely unsound.

Upon the authority of *Smeltzer v. Miller*, *supra*, the judgment and order are reversed, and the cause remanded.

Harrison, J., and Van Fleet, J., concurred.

[Crim. No. 305. Department Two.—December 29, 1897.]

THE PEOPLE, Respondent, v. LEWIS KAISER, Appellant.

CRIMINAL LAW—INCEST—SUFFICIENCY OF INDICTMENT—CARNAL INTERCOURSE WITH DAUGHTER.—An indictment for incest, charging that the defendant L. K., at a time and place stated, "did willfully, unlawfully, knowingly, incestuously, and feloniously, upon the person of one C. K., the daughter of said L. K., commit fornication, and have sexual intercourse with and carnally know the said C. K., contrary," etc., sufficiently conforms to all the requirements of the statute, and sufficiently shows that the offense was committed upon an immediate female descendant of the defendant, and not upon an adopted daughter or a stepdaughter or a daughter in law.

ID.—DAUGHTER UNDER AGE OF CONSENT—RAPE—ADDITIONAL INDICTMENT—REVIEW UPON APPEAL.—The fact that the daughter with whom the incest was committed was under the age of consent, and that the crime committed also included the crime of rape, does not preclude the putting of the defendant on trial for the crime of incest; nor can the fact that an additional indictment was found for the crime of rape be considered upon appeal from a verdict of conviction of the crime of incest, where the record does not disclose that any such indictment was found.

ID.—TESTIMONY OF DAUGHTER—CORROBORATION—CONFLICTING EVIDENCE. Where the testimony of the daughter, though slightly corroborated, clearly and explicitly detailed the circumstances of the crime charged against her father, and was sufficient, if believed, to uphold a conviction, the fact that the defendant was called as a witness in his own behalf, and positively denied all the charges made against him, cannot entitle the defendant to a reversal of the judgment, upon the ground that the evidence was insufficient to justify or support the verdict.

ID.—REQUESTED INSTRUCTION AS TO REASONABLE DOUBT—MODIFICATION. An instruction requested by the defendant, that the facts tending to prove the guilt of the defendant must be established in the minds of the jury beyond a reasonable doubt, "that is, it must entirely satisfy" them of the guilt of the deceased before they could convict, and that if they were not "entirely satisfied," they should acquit him, though it might have been given as requested, is not rendered erroneous or misleading by striking out the word "entirely" therefrom, and giving it as thus modified.

APPEAL from a judgment of the Superior Court of Placer County and from an order denying a new trial. J. E. Prewett, Judge.

The facts are stated in the opinion of the court.

J. Edward Marks, for Appellant.

W. F. Fitzgerald, Attorney General, and C. N. Post, Deputy Attorney General, for Respondent.

THE COURT.—The defendant was indicted for the crime of incest, alleged to have been committed upon his daughter, a girl under thirteen years of age. He was tried and found guilty of the offense charged, and the judgment was that he be punished by imprisonment in the state prison for the term of ten years. From that judgment and an order denying his motion for a new trial he has appealed.

The indictment was returned and filed December 22, 1896, and the charging part of it is as follows: "That said defendant, Lewis Kaiser, on or about the first day of January, A. D. 1896, and before the finding and presentation of this indictment, at the county of Placer, and state of California, did willfully, unlawfully, knowingly, incestuously, and feloniously, upon the person of one Cordelia Kaiser, the daughter of said Lewis Kaiser, commit fornication and have sexual intercourse with, and carnally know the said Cordelia Kaiser, contrary," etc.

The defendant demurred to the indictment upon the ground that it did not conform to the requirements of sections 950, 951, and 952 of the Penal Code; that it did not state facts sufficient to constitute a public offense; and that it did not appear upon the face thereof, positively, that said Cornelia Kaiser was then and there the daughter of defendant, or that she was not his stepdaughter.

The demurrer was properly overruled. The indictment stated the acts constituting the offense in the language used in the information, which was held sufficient in *People v. Patterson*, 102 Cal. 239, and we think it sufficiently conformed to all the requirements of the statute. The objection that it does not appear that Cordelia Kaiser was then and there the daughter of defendant, as she might have been a stepdaughter, cannot be entertained. The word "daughter" means, and is generally understood to mean, "an immediate female descendant," and not an adopted daughter, a stepdaughter, or a daughter in law. So, also, the objection that the defendant was on the same day indicted for the crime of rape, alleged to have been committed

upon his daughter, Cordelia, at the same time and place, cannot be considered here, since it does not appear from the record in this case that any such indictment was found. And assuming that the facts stated in the indictment in this case were sufficient to constitute the crime of rape, the daughter then being under the age of consent, still, under section 285 of the Penal Code, they clearly constituted the crime of incest, and the defendant was, therefore, properly put upon trial for that offense.

The trial was commenced February 3, 1897, and was concluded three days later. Cordelia was born June 6, 1884, and at the time of the trial was four months less than thirteen years of age. She was the principal witness for the prosecution, and most of the criminating evidence was given by her. She told the story of her life from the time she was three or four years old, and what at that early age her father attempted to do, and what he afterward accomplished.

When she was first called before the grand jury as a witness she denied in toto the charges against her father, and said he had never had sexual intercourse with her, but four days later she again went before the grand jury, and then said she did not tell the truth the first time, and gave the evidence on which the indictment was found.

The evidence of this witness, given at the trial, need not be set out. Sufficient to say that it clearly and explicitly detailed the circumstances of the awful crime with which the parent was charged.

The defendant was called as a witness in his own behalf, and positively denied all the charges made against him.

In support of the appeal, it is earnestly contended that the judgment should be reversed upon the ground that the evidence was insufficient to justify or support the verdict. Citing *People v. Benson*, 6 Cal. 221; 65 Am. Dec. 506; *People v. Hamilton*, 46 Cal. 540, and other cases.) This may not be done. It is true that the corroborating evidence was slight, and it is equally true that under the horror and repugnance which such a charge excites juries may be swift to convict; but nevertheless the evidence in the case was sufficient to uphold a conviction, and the defendant was refused a new trial before a dispassionate judge, who had heard all of the testimony and seen all of the witnesses.

The defendant asked the court to instruct the jury that "those facts or that state of facts tending to prove the guilt of the defendant must be established in your minds to a moral certainty and beyond a reasonable doubt. That is, it must entirely satisfy you of the guilt of the defendant before you can convict. If you are not entirely satisfied you should acquit him." The court struck out the word "entirely" in both places where it was used, and then gave the instruction.

In *People v. Padillia*, 42 Cal. 535, in *People v. Kerrick*, 52 Cal. 446, and in *People v. Carrillo*, 70 Cal. 643, the instructions under review were substantially the same and to the following effect: "All that is necessary, in order to justify the jury in finding the defendant guilty, is that they shall be satisfied from the evidence of the defendant's guilt to a moral certainty and beyond a reasonable doubt, although they may not be entirely satisfied from the evidence that the defendant and no other person committed the alleged offense." In reversing these cases, it was said that the modification, "although they may not be entirely satisfied," etc., was, and was intended to be, a material qualification of the first clause, which contained a correct statement of the law. It was equivalent to telling the jury that they might be satisfied to a moral certainty and beyond a reasonable doubt, but at the same time not entirely satisfied of the defendant's guilt; and it was declared by this court that, when a jury is satisfied to a moral certainty and beyond a reasonable doubt, it must in the nature of things be entirely satisfied. The instruction was, therefore, calculated to confuse and mislead, and a very apparent injury to the defendants was thus worked. In this case, however, an entirely different instruction is presented. It is an instruction which first tells the jury that the guilt of the defendant must be established in their minds to a moral certainty and beyond a reasonable doubt. It would seem that a juror must be lacking in common intelligence if so much of the language is not to his understanding clear and free from doubt. The second portion of the charge does not tend to mislead or confuse, as in the cases cited. It amounts to an additional declaration that they should be satisfied of the guilt of the defendant. In the other cases the jury were told that they need not be entirely satisfied. It would doubtless have been as well in the

case at bar had the court given the instruction without eliminating the adverb, but we are unable to see that the instruction as given was either erroneous in point of law or could have confused or misled the jury. In *People v. Cheong Foon Ark*, 61 Cal. 527, the proposed instruction was well-nigh identical with the instruction here, but there the court refused to give the instruction absolutely, while here it gave it with the modification indicated, and it does not appear from the record that any equivalent instruction was given in its place. The error in refusing the instruction was therefore clear.

The judgment and order appealed from are therefore affirmed.

[L. A. No. 317. Department One.—December 30, 1897.]

LEE SEABRIDGE, Respondent, v. ROBERT MCADAM,
Appellant, and T. H. JOHNSON, Defendant.

MALICIOUS PROSECUTION—ARREST UPON CRIMINAL CHARGE—INSTRUCTIONS—IMPROPER CHARGE AS TO ADMISSION OF ANSWER.—In an action for a malicious prosecution of the plaintiff upon a criminal charge, where the separate answer of a defendant not appealing admitted that he had filed the complaint with a justice of the peace charging the plaintiff with a criminal offense, and the separate answer of the defendant appealing contained no admission that such complaint was filed by him, it is a substantial error against such appellant for the court to charge the jury that it was admitted by the answer of the defendants "that the defendants did file a complaint with a justice of the peace charging the plaintiff with a criminal offense."

ID.—ADVICE OF COUNSEL—IMPROPER INSTRUCTION AS TO GOOD FAITH OF COUNSEL.—An instruction as to protection of the defendant from a malicious prosecution under advice of counsel, stating that "such advice must be sought and given in good faith and with an honest purpose," is erroneous, the question of the good faith of counsel in giving the advice not being an element in the problem.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

A. R. Metcalfe, and J. H. Merriam, for Appellant.

Edwin Baxter, for Respondent.

GAROUTTE, J.—This is an action to recover damages for a malicious prosecution. Defendant McAdam was the owner of a certain tract of inclosed land. Plaintiff Seabridge was a subtenant of defendant's vendor, and was cultivating a portion of this land to grain. Defendant, claiming the exclusive possession of the land, fastened the entrances thereto. Plaintiff, claiming the right to enter, broke the gates and entered. He was arrested for malicious mischief upon complaint of Johnson, an employee of defendant and a codefendant in this action. Upon this charge of malicious mischief Seabridge was acquitted, and thereupon brought this action, claiming that his arrest and prosecution were malicious.

The verdict of the jury was against defendant McAdam, the appellant here, and we cannot say that the evidence was insufficient to support it. In view of all the facts, the amount of damages awarded to plaintiff (eight hundred dollars) may be said to be somewhat excessive. It is very difficult to see wherein plaintiff has been damaged in any such amount. Even when exemplary damages are allowed, some limit within reason should be fixed, but, as the case must be returned for a new trial upon other grounds, we pass the matter without more consideration.

The court instructed the jury as follows: "This is a civil action for damages for an alleged malicious prosecution of the plaintiff by the defendants upon a criminal charge. The prerequisites in such an action, which are alleged in the complaint, are admitted by the defendants' answer: 1. That the defendants did file a complaint with a justice of the peace charging the plaintiff with a criminal offense." As stated by the learned judge, this fact was a necessary prerequisite to plaintiff's recovery, and the instruction quoted conclusively took away from the jury any consideration of the evidence introduced at the trial bearing upon it. To be sure, if a material fact be admitted by the pleading, the court has a right to instruct the jury to that effect, but it is only in a clear case that such instruction should be given. At the trial it in no way appeared that defendant McAdam conceded that he filed the complaint against plaintiff. If the evidence shows anything upon the point, it would appear to be a contested issue of fact, but we are not now dealing with the evidence, but with the law. Was the instruction justified

by the allegation of McAdam's answer? Johnson, the codefendant, filed a separate answer, and it may be said that he made such an admission, but we find no such admission in the answer of McAdam. There is nothing in the pleading looking toward an admission of the fact, unless it be found in the following allegations: "Said defendant, Robert McAdam, further answering plaintiff's said amended complaint, alleges that . . . he was credibly informed, to wit, by the defendant, T. H. Johnson, that theretofore, to wit, on the fourteenth day of August, 1893, the plaintiff in this action did maliciously and willfully tear down a fence to make a passage through an inclosure belonging to said Robert McAdam; that thereupon he in good faith, and believing that the plaintiff had committed a public offense, advised the said T. H. Johnson to state the facts of the case to Samuel Owens, a justice of the peace of said county, residing in the said town of Whittier; that thereupon said Johnson did appear before said justice and state the facts of the case, and that a complaint was made in accordance therewith, and sworn to by said Johnson and was filed by said justice, charging the plaintiff with said offense, and a return was thereupon issued by said justice for the arrest of the plaintiff upon said charge." These allegations wholly fail to substantiate the statement of the court that defendant McAdam admitted by his answer that he filed the complaint against the plaintiff. The defendant had the right by his pleading to go before the jury claiming that under the evidence he did not file the complaint against this plaintiff. This right was a most substantial one, and was denied to him by the instruction of the court.

The court also gave the jury the following instruction: "The court instructs that, in order to claim protection under advice of counsel, three requisites are necessary: 1. Such advice must be given after a full and fair statement to the attorney of all the facts in the case which the defendants knew, or had reasonable cause to believe; 2. Such advice must be sought and given in good faith and with an honest purpose." It is said in *Sandell v. Sherman*, 107 Cal. 397: "The question of the good faith of counsel in giving the advice is not an element in the problem."

For the foregoing reasons the judgment and order are reversed and the cause remanded for a new trial.

Harrison, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

[S. F. No. 693. Department Two.—December 30, 1897.]

J. C. RUED, Assignee, etc., Appellant, v. F. T. COOPER and WARNER STAUF, Respondents.

VOID CONTRACT—SALES OF STOCKS ON MARGIN—ACTION FOR MONEY PAID—DEFENSE—ACCORD AND SATISFACTION—INSUFFICIENT PROOF—SETTLEMENT OF STOCK ACCOUNT—RECEIPT IN FULL—BASIS OF VALIDITY OF CONTRACT.—In an action by the assignee of an insolvent debtor to recover money paid by the insolvent debtor to stockholders under a void contract for the purchase and sale of stocks on margin, evidence of a mere settlement and receipt in full of the balance of the stock account, consisting of the dealings under the contract for the purchase and sale of the stocks upon a margin, upon the assumption that those dealings were regular and legal, without proof of any agreement to settle any claim for the recovery of the money illegally paid under the void contract, or that such claim was known or considered, or referred to in any manner upon the settlement, does not sustain a defense of accord and satisfaction of the claim sued upon.

ID.—EVIDENCE—IGNORANCE OF LEGAL RIGHTS.—In such action, it is error to refuse to permit the insolvent debtor to answer a question as to whether he knew of any law authorizing the recovery of money paid in on margin stock transactions at the time of signing the receipt in full of the balance of stock account; nor is it a valid objection to such question that the witness was presumed to know the law, and could not be excused for ignorance of it.

ID.—MAXIM—IGNORANCE OF LAW—EXCEPTION—MISTAKE OF FACT ARISING FROM MISTAKE OF LAW—RELIEF IN EQUITY.—The maxim, *Ignorantia legis neminem excusat*, though applicable generally to mistakes of law pure and simple, does not apply to the exceptional case where a party has acted in ignorance of his antecedent and existing private legal rights, and under a misapprehension which involves a mistake of facts arising out of a mistake of law as to the existence of a legal right or title, which there could not have been an intention to part with, while in ignorance of it; but, in such case, equity will grant relief from the legal effect of instruments which surrender such unsuspected right or title.

ID.—CODE PROVISIONS—IGNORANCE OF FACT—MISAPPREHENSION OF LAW—LIMITED EFFECT OF GENERAL RELEASE.—A settlement with stock-

brokers and receipt in full of a balance of the stock account, made in ignorance of a legal right to recover moneys paid to them for the purchase and sale of stocks on margin, if regarded as involving a mistake of fact, involves unconscious ignorance of a fact material to the contract, within subdivision 1 of section 1577 of the Civil Code, and, if regarded as involving a mistake of law, involves a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law, within section 1578 of the Civil Code; and regarding the receipt as a general release, it could not, under section 1542 of the Civil Code, extend to claims which the creditor did not know or suspect to exist in his favor at the time of executing the release which, if known by him, must have materially affected his settlement with the debtor, nor is it material that his ignorance of the fact of its existence was occasioned by his ignorance of law.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion.

Henley & Costello, and R. R. Bigelow, for Appellant.

James M. Allen, and Eugene R. Garber, for Respondent.

HAYNES, C.—The plaintiff is the assignee in insolvency of C. A. Macomber. The defendants were formerly copartners as Stauf & Cooper, stockbrokers engaged in buying and selling shares of stock in mining and other corporations. This action was brought to recover from the defendants a large amount of money advanced by Macomber to the defendants for the purpose of buying, carrying, and selling shares of stock in mining corporations for said Macomber, upon a margin, under a contract for that purpose.

The cause was tried by the court and written findings were filed and judgment entered for the defendants, and plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The court found the agreement to have been made as alleged, and that pursuant thereto, between January 21, 1887, and August 19, 1887, the defendants bought and sold for Macomber a large number of shares of stock in various mining corporations upon a margin, and that between said dates Macomber advanced

and paid to defendants under said contract three thousand nine hundred and ninety-three dollars and seventy-nine cents; but the court further found that defendants' second defense was true, and upon that finding gave judgment for defendants.

Said second defense was, in substance, that on July 19, 1887, defendants paid to Macomber one hundred and eighty-eight dollars and fifty-seven cents, and delivered to him certain shares of stock in certain mining corporations, and "that said sum of money and said shares of stock were received and accepted by said Macomber in full payment, settlement, and satisfaction of the claim, demand, and cause of action set up in said amended complaint."

Two grounds are presented upon the record, upon which appellant claims the judgment should be reversed: 1. That the evidence does not justify the finding in favor of the defendants upon their said second defense; and 2. That the court erred in sustaining defendants' objection to a question put to Macomber by counsel for plaintiff.

Section 26 of article IV of the constitution, among other things, provides as follows: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction."

The court below and counsel for respondent treats said second defense as an accord and satisfaction. The evidence relating thereto is brief.

Mr. Macomber's testimony in chief was as follows: "I remember that a certain receipt was exhibited to me here and introduced in evidence, having been given by me to the defendants in this case at the time I wound up my stock transactions with them. At the time the receipt was given, or before then, nothing was said or passed between myself and the defendants in respect to any cause of action I might have to recover back what moneys I had paid on the stock transactions."

"Mr. Henley.—I will ask you now, if you, yourself, knew of any instance of any law in the constitution of this state, or of any law at all, authorizing the recovery of money paid in on

margin stock transactions, at the time of the signing of that receipt?"

The question was objected to as "irrelevant, immaterial, and incompetent; that he is presumed to know the law." Said objection was sustained, and that ruling is assigned for error.

Defendant Cooper testified: "On July 19, 1887, I made a settlement with Mr. Macomber, and he signed the following receipt:

"Date July 19, 1887.

"Received of Stauf & Cooper \$188.57, 200 Impl. 100 Confidence, bala. acct. in full.

C. A. MACOMBER."

"I asked him to give me a receipt in full. I delivered him the money and stocks and took that receipt."

It was further testified that the only transaction after that was that defendants sold certain stocks for Macomber which he brought to them to be sold, and which were sold for cash and accounted for, and a receipt covering that transaction was taken on August 13, 1887.

The court below, in its opinion (a copy of which is in the transcript), said that "the only question is whether there has been an accord and satisfaction."

The code defines an accord as "an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled." (Civ. Code, sec. 1521.)

That the settlement of July 19th was of the dealings under the contract for the purchase and sale of mining stocks upon a margin, and upon the assumption that those dealings were regular and legal, cannot be doubted. Macomber expressly testified that nothing was said at that time, or before, about the moneys he had advanced, and which the court found to have been three thousand nine hundred and ninety-three dollars and seventy-nine cents, nor was that statement disputed by Cooper. The payment of the money was therefore of a sum conceded to be due under the terms of the contract. As to the shares of stock that were delivered, the court concluded that, as "it does not appear that the stocks were received at any agreed price, the presumption arises that they were received in full satisfaction of all demands which Macomber had against defendants,

and that no inference should be drawn that the transaction was not intended as a full settlement from the fact that the stocks were not then of a value equal to the amount of money which Macomber was then entitled to recover."

This conclusion would have been right if it had appeared that the present claim of the plaintiff had been known or considered. There was no evidence tending to show that the stock was delivered for any such purpose, or tending to show that the stock so delivered was the property of the defendants; while the presumption is "that a thing delivered by one to another belonged to the latter." (Code Civ. Proc., sec. 1963, subd. 8.)

There was no dispute or controversy, and hence no agreement to accept something different from, or less, than that to which Macomber was legally entitled, and therefore there was no accord; and the payment of a part of the whole debt due is not a good satisfaction, even if accepted, unless the amount of the claim is disputed; and there was not then, or theretofore, any controversy, both parties—so far as the record discloses—having acted upon the supposition that the contract and the transactions thereunder were valid; while the cause of action here involved is for moneys advanced to defendants under a void contract. Unless, therefore, the settlement and receipt of July 19, 1887, operated in some other way to extinguish or bar said cause of action, the judgment appealed from cannot be sustained.

The testimony of Mr. Macomber was that nothing was said at or before the settlement as to his right to recover back the money he had advanced; and it was then sought to be shown that he did not know that he had such right. The question put for that purpose was objected to upon the ground that it was immaterial—that he was presumed to know the law.

The discussion of the case by counsel is largely devoted to the question as to whether relief can be granted from such mistake as that made by Macomber, the defendants regarding it as a pure mistake or ignorance of law, to which the maxim, *Ignorantia juris neminem excusat*, should be applied.

As to the general rule that mistake of law, pure and simple, is not adequate ground for relief, there is no controversy; nor is there any serious controversy as to the proposition that there are exceptions to that general rule.

We do not, however, regard this as a mistake of law, pure and simple, but as belonging to a distinct class recognized by law writers of acknowledged ability and sanctioned by numerous decisions. This class is defined by a general rule formulated by Professor Pomeroy, concerning which he says: "The number of decisions which support it, and which it explains, is very great." That rule is as follows: "Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract, or personal status, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." (2 Pomeroy's Equity Jurisprudence, sec. 849, p. 1178.)

So, in 1 Story's Equity Jurisprudence, section 122, page 131, it is said: "Indeed, where the party acts upon the misapprehension that he has no title at all in the property, it seems to involve in some measure a mistake of fact, that is, of the fact of ownership arising from a mistake of law. A party can hardly be said to intend to part with a right or title of whose existence he is wholly ignorant; and, if he does not so intend, a court of equity will in ordinary cases relieve him from the legal effect of instruments which surrender such unsuspected right or title."

That there are decisions which are inconsistent with the foregoing statements of the law is not disputed, but that the great weight of authority, both English and American, sustains the views expressed in the above quotations is beyond serious controversy.

A discussion of the many cases upon this subject, however interesting or instructive it might be, cannot be indulged within the limits of an opinion; nor is it necessary to give a construction to the provisions of the Civil Code upon the subject of mistake (Civ. Code, secs. 1577, 1578), though we see no conflict between those sections and the law as stated by Pomeroy and Story, since, if it be regarded as a mistake of fact, this case is within subdivision 1 of section 1577, and if a mistake of law,

upon the record as it is before us, it is within subdivision 1 of section 1578.

But there is another provision of the code upon which this case may be decided, and which is in clear accord with the two authorities we have above quoted.

We have seen that the payment of the money and the delivery of the stock could not be held to be an accord and satisfaction; and since there is no pretense that the demand has been specifically released, or has otherwise been paid or satisfied, if the receipt can operate to defeat plaintiff's action it must do so as a general release.

Section 1542 of the Civil Code provides as follows: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with his debtor."

This section, it will be observed, does not base the right to relief upon any fraud or concealment by the debtor or other person. It is sufficient that the creditor does not know or suspect its existence; nor is it material that his ignorance of the fact of its existence was occasioned by his ignorance of law.

It was, therefore, competent and material to show by Macomber that when he gave the receipt he did not know or suspect that he had a legal claim against the defendants for the money he had advanced to them in these marginal stock transactions. The question put to Macomber was evidently for the purpose of showing that he did not know that he had a right to recover the money he had advanced to the defendants, but it should have been directly to the point whether he knew or suspected that he had such right.

It may be thought that the plaintiff's claim does not commend itself to the equitable consideration of the court. Macomber is certainly entitled to little sympathy, but the constitutional provision, under which this claim is made, is the declaration of a public policy, and in that light the case should be considered.

We advise that the judgment and order appealed from be reversed and a new trial ordered.

Belcher, C., concurred.

Britt, C., concurred in the result.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial ordered.

Harrison, J., Garoutte, J., Van Fleet, J.

Hearing in Bank denied.

McFarland, J., dissented from the order denying a hearing in Bank.

[S. F. No. 947. Department Two.—December 30, 1897.]

MARGARET SUTTON AINSWORTH, Executrix, etc., Respondent, v. BANK OF CALIFORNIA, Appellant.

ESTATES OF DECEASED PERSONS—ACTION BY EXECUTOR—DEPOSIT IN BANK BY DECEDENT—NOTE OF DEPOSITORS ACCRUING AFTER DEATH—COMPENSATION OF CROSS-DEMANDS—COUNTERCLAIM.—In an action by an executor to recover from a bank the amount of a deposit made by the decedent, the bank has the right to claim as against the executor a compensation of cross-demands by credit of the amount of the deposit upon a note for a larger sum made by the decedent to the bank in his lifetime, and which accrued subsequently to his death and prior to the commencement of the action, the demands being deemed compensated so far as they equal each other, under section 440 of the Code of Civil Procedure; and has the right also to plead the note as a counterclaim to the action by the executor to recover the amount of the deposit, under sections 437 and 438 of the same code, the note being a matured claim upon contract existing at the commencement of the action.

Id.—TITLE OF EXECUTOR OR ADMINISTRATOR—RELATION—SUBJECTION TO COUNTERCLAIM—BALANCE OF MUTUAL DEMANDS—PURPOSE OF LAW. The title of an executor or administrator to the assets of the estate takes effect by relation from the death of the decedent, but it passes subject to any right of setoff or counterclaim existing in favor of a creditor of the estate; and the purpose of the law in adjusting mutual demands in favor of the estate and of a claimant against it, is to ascertain the balance existing, and to give both to the claimant and to the estate the benefit of all just setoffs, whether the estate be solvent or insolvent; and claims not liquidated and debts absolutely due, though payable in future, are to be included in the adjustment, and the balance found upon such adjustment is the only debt remaining.

Id.—CONSTRUCTION OF CODE—EFFECT OF DEATH BEFORE MATURITY OF DEMAND—OFFSET AGAINST EXECUTOR.—The statute of setoff relates to the situation of the parties at the commencement of the action; and the death of one of the parties to the demand, though such

death occur before the maturity of the demand, will not change the relative rights of the parties in pleading a counterclaim, or in compensating cross-demands so far as they equal each other, provided the setoff be due when the action is commenced by the executor.

APPEAL from a judgment of the Superior Court of Alameda County. W. E. Greene, Judge.

The facts are stated in the opinion.

James M. Allen, for Appellant.

Davis & Hill, and Rodgers & Paterson, for Respondents.

CHIPMAN, C.—The facts are admitted and found to be as follows: September 27, 1895, George J. Ainsworth, plaintiff's testator, executed his note to the Bank of California for \$10,000, payable December 26, 1895. He was a customer of the bank, and at his death, October 20, 1895, had on deposit there to his credit the sum of \$5,974.25. On December 26, 1895, the day the note matured, the bank, without the consent of respondent, applied this sum on the note. On December 30, 1895, letters testamentary were issued to respondent by the superior court of Alameda county. February 17, 1896, respondent presented her check for said deposit to the bank and demanded payment, which was refused. February 21, 1896, the bank presented its claim on said note therein, crediting it with said sum of \$5,974.53, which claim was rejected on March 3d. On March 9, 1896, plaintiff commenced her action to recover the sum so deposited. In its answer the bank set up its presented claim and claimed the right to use it as a counterclaim under sections 437 and 438 of the Code of Civil Procedure, and also the right to apply said deposit on said note by virtue of its banker's lien, and also that the two debts—the note and said deposit of \$5,974.53—should be deemed compensated, so far as they equal each other, under section 440 of the Code of Civil Procedure. There is no finding or evidence as to the solvency or insolvency of the estate. The court denied the right of defendant to use the note as a counterclaim, or to apply the said sum of \$5,974.53 on the note, and denied the right to such "compensation." Judgment was given for plaintiff for \$5,974.53, and for defendant for \$10,000

and interest payable in due course of administration. The appeal is from the judgment and comes here on bill of exceptions.

Under section 437 a defendant may answer by: "2. A statement of any new matter constituting a defense or counterclaim." A counterclaim is, by section 438, defined to be: "One existing in favor of defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: . . . 2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action."

Counsel for plaintiff make an ingenious argument to the effect that these sections simply prescribe a rule for pleading counterclaims—how to plead them and what qualities they must possess in order that they may be pleaded—but leaves the question entirely open "as to what counterclaims are, and what are not, claims upon which a several judgment might be had in the action." It is true that section 438 says that the counterclaim mentioned in section 437 must possess certain elements, but it goes further, we think, and defines what a counterclaim is, as well as when it may be pleaded. The section practically says that a counterclaim is defined to be what the section says may be pleaded as such. It is suggested by respondent that a rule which would allow this counterclaim would, in many cases, take assets out of administration, through proceedings in which other creditors could not be heard; would pay one creditor to the exclusion of others; would render inoperative provisions for the temporary support of the family of the deceased—to which all debts are postponed; and therefore the rule cannot be sound. (Citing *Fitzpatrick v. Brady*, 6 Hill, 581; *Lieber v. Lewis*, 15 Serg. & R. 108; *Jordan v. National etc. Bank*, 74 N. Y. 467; 30 Am. Rep. 319.)

Respondent makes the point also that the counterclaim should be rejected for want of mutuality, grounding the objection upon the fact that the note of deceased was not due when he died, and that nothing ever did become due from him; that plaintiff sued as executrix in her representative capacity for a debt due the deceased at his death, and her title and right of action are to be considered as of that date, as is also the right of defendant to set up the counterclaim, at which time nothing was due defend-

ant. (Citing *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384.)

The contention is that if A owes B \$1,000 upon a promissory note, and B owes A a like sum on promissory note, both due on the same day in the future, and A meanwhile dies, A's administrator may sue and recover when B's note to A matures, but B cannot plead A's note by way of counterclaim because B now owes the estate and not A, and there is no mutuality because a right of action on A's note did not accrue in A's lifetime. Such is the apparent reasoning of *Patterson v. Patterson*, *supra*, and also of *Jordan v. National etc. Bank*, *supra*, cited by respondent.

In the case cited from 6 Hill the *pro rata* distribution of an estate was not a question; the case is not in point. *Leiper v. Levis*, *supra*, was decided upon the construction given to the act of 1794, then in force in the state of Pennsylvania, and the question was as to the right of a judgment creditor of an insolvent estate gaining a priority over other judgment creditors by taking out and levying a *fieri facias* which related to a day prior to the intestate's death. The case does not seem to throw any light on this case.

In *Patterson v. Patterson*, *supra*, plaintiff, as executrix, brought suit to foreclose a mortgage executed by defendant to plaintiff's testator given to secure a promise in the nature of an annuity, which by its terms was made to depend upon the testator's death, and was payable to his executrix or administratrix after his death. Defendant sets up as counterclaim a claim for rent due him from the testator at the time of his decease. It was said there was no mutuality, and the setoff was disallowed. The case follows the construction given by the English courts to the statute of 2 George II, chapter 22, to which the New York statute was similar. The decision is well considered and was followed in *Jordan v. National etc. Bank*, *supra*. The statute of New York (2 Rev. Stats., sec. 23) reads: "In suits brought by executors, etc., demands existing against their testators, etc., and belonging to the defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased." The case of *Patterson v. Patterson*, *supra*, does not necessarily support respondent, although, as interpreted in *Jordan v. National*

etc. Bank, supra, it may be so applied. In this latter case the relation of the claims of the parties was the reverse of *Patterson v. Patterson, supra*. Jordan sued as administratrix on a demand owned by the intestate in his lifetime, and due and payable to him then; while the promissory note which defendant sought to set off, though owned by it in the lifetime of the intestate, was not due and payable until after his death. It was held that for a demand to be set off against an executor or administrator, in an action brought by him, it must have been due and payable from the decedent in his lifetime. We think that the provisions of our section 438 of the Code of Civil Procedure, read with section 440, are different from the New York statute. The clause "any other cause of action arising upon contract, and existing at the commencement of the action" (Code Civ. Proc., sec. 438, subd. 2) is not in the New York statute. Section 440 provides that: "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other." Our statute of setoff, we think, relates to the situation of the parties "at the commencement of the action," and the death of one of the parties to the demand, though such death occur before the maturity of the demand, will not change the relative rights of the parties in pleading a counterclaim or in compensating the claims so far as they equal each other, provided the setoff be due when the action is commenced.

In New Hampshire and Massachusetts, the statutes were said to be substantially the same as the statute of George II. In both these states the rule contended for by appellant was sustained. In *Mathewson v. Strafford Bank*, 45 N. H. 104, where the question was examined, and the rule as in *McDonald v. Webster*, 2 Mass. 498, and *Bigelow v. Folger*, 2 Met. 255, was followed, a clear distinction is drawn between debts or demands to and from executors in their own right "and those where the transactions were wholly between the deceased and the adverse party in the lifetime of the former but the contingent claims have become absolute, and the claims not due have become payable

after the decease." Said the court: "We are unable to see why such demands should not be set off against an administrator when they become absolute and payable."

We cannot assent to the doctrine that our statute does not apply because the cross-demand of the bank was not due when plaintiff's testate died; it was due when action was brought. (*St. Louis Nat. Bank v. Gay*, 101 Cal. 286.) The debt existed at his death.

Section 61 of the Indiana code (2 Rev. Stats. 1876, p. 64) reads almost as our section 440, *supra*; there is no substantial difference. In *Convery v. Langdon*, 66 Ind. 311, the New York cases and the New York statute *supra* were considered, and it was said: "The cross-demand must have been an existing demand against the testator or intestate at his death. It is not necessary that the cross-demand thus existing should have become due at the time of the testator's death. It is sufficient if it become due and payable in time to be pleaded as a setoff in the same manner as if the testator or intestate had lived to bring the action." (See, also, *Waterman on Setoff*, secs. 24, 97; *Rawson v. Copland*, 3 Barb. Ch. 166 (limited and distinguished in *Patterson v. Patterson*, *supra*); *Matthewson v. Strafford Bank*, *supra*; *Skiles v. Houston*, 110 Pa. St. 255; *Byles on Bills*, 531, and note 8; *Temple v. Scott*, 3 Minn. 419.)

It is laid down as the rule in *Woerner's Law of Administration*, volume 2, section 398, supported by cases there cited, that where the defendant and deceased had mutual dealings, the judgment can be only for the difference between the claims of the creditor and the decedent; and this is there said to be true, whether the debts are payable simultaneously or the one *in praesenti* and the other *in futuro*.

The claim of respondent that by the death of plaintiff's testator the demand passed *eo instanti* to his representatives and took date by relation to the date of the testator's death, is correct only to this extent, that it passed subject to any right of setoff or counterclaim in appellant. The demand was not an asset of the estate in the sense claimed and to the exclusion of appellant's right of setoff. As was said in *Richardson v. Parker*, 2 Swan, 529: "The notes and accounts of the deceased are not assets if they have been discharged by payment, the creation of adverse accounts, or otherwise; it is only what remains after all just settle-

ments with the debtor of the estate, which goes into the funds for distribution." (See *Finnell v. Nesbit*, 16 B. Mon. 351, and *Ely v. Commonwealth*, 5 Dana, 398, therein referred to. See, also, *Ford v. Thornton*, 3 Leigh, 695.)

That the title of the administrator to the assets of the estate takes effect by relation, from the intestate's death, respondent cites *Babcock v. Booth*, 2 Hill, 181; 38 Am. Dec. 578. In that case, the general rule was stated to be that the administrator can only maintain such claims as the testator or intestate might have successfully asserted if living. An exception to the rule was found in the case cited, however, where the deceased was a fraudulent vendor who remained in possession until his death, and as to his creditors the sale was held void against the fraudulent vendee, who took the property from the possession of the widow after her husband died. We do not think the case before us would be an exception to the general rule as above stated, or that the creditors of the estate would stand in any better position than the testator would himself have stood had he lived and had drawn his check after his note was due and had been refused payment.

Under our code provisions as to claims against estates of deceased persons, it is compulsory upon the claimant to present his claim under oath stating all offsets and credits. Without doing this he cannot maintain an action or be paid his claim. The purpose of the law, we think, is to ascertain the balance existing, and to give to both the claimant and the estate the benefit of all just offsets whether the estate be solvent or insolvent. As was said in *Aldrich v. Campbell*, 4 Gray, 284: "The settlements with such estates [insolvent] are final, and all mutual demands are to be balanced. Claims not liquidated, and debts absolutely due, though payable in the future, are to be included. The balance found upon such adjustment is the only debt remaining. In the case of an insolvent estate of one deceased, all claims existing at the time of the death are to be set off." If this is sound law in the case of insolvent estates, and we think it is, it certainly must be so if the estate be solvent, for no harm can come to anyone by applying the rule in the latter case.

We find nothing in the sections of the Code of Civil Procedure cited by respondent in conflict with this view of the matter.

The inventory required to be made by the administrator or executor by sections 1443-46, and the duty imposed by section 1581 to take into his possession all the estate, etc., and to collect all debts due to decedent, etc., cannot affect the rights of creditors of the deceased or change their relations in respect of mutual obligations.

The view we have taken of the case makes it unnecessary to decide whether the appellant had a right to apply the deposit by virtue of the banker's lien claimed by it. We think the court below erred in its conclusions, and advise that its judgment be reversed and that judgment be ordered for defendant, payable in due course of administration, for the amount of its note and interest, less the amount of said deposit credited as of the date of December 26, 1895, the date when indorsed on said note.

Haynes, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the judgment ordered for defendant, payable in due course of administration, for the amount of its note and interest, less the amount of said deposit credited as of the date of December 26, 1895, the date when indorsed on said note.

McFarland, J., Garoutte, J., Van Fleet, J.

[L. A. No. 164. In Bank.—December 30, 1897.]

N. L. WHELOCK et al., Appellants, v. FIRST PRESBYTERIAN CHURCH OF LOS ANGELES et al., Respondents.

RELIGIOUS CORPORATIONS—DIVISION OF CHURCH—ACTION FOR DIVISION OF FUNDS—PARTIES—REPRESENTATION OF NUMEROUS MEMBERS.—Where an incorporated Presbyterian church was divided, by authority of the Presbytery, into two organizations, to each of which was given a new name, and the Presbytery directed a division of funds realized from a sale of real estate of the corporation to be made between the two churches in proportion to their membership, and the minority organized another church in pursuance of the decrees of the Presbytery, but the majority repudiated its action, and refused to organize a new church as directed, but retained and insisted upon the corporate name, and refused to pay any part of the funds to the new church, an action in equity may be brought on behalf of the

new church to compel an equitable division of the trust funds; and the new church being an unincorporated body, consisting of numerous members, alleged to have a common and personal interest in the cause of action, a few of its members may maintain the action on behalf of themselves and all others of its members, and where the parties defendant consisted of the corporation and its trustees, and of a few individuals who were made members of the other church ordered by the Presbytery to be organized by the majority, who are alleged to be sued on behalf of themselves and all other members ordered to make such organization, and who refused to abide by the action of the Presbytery, there is no defect of parties plaintiff or defendant.

ID.—POWER OF ECCLESIASTICAL COURT—AUTHORIZED DIVISION OF CHURCH—CONCLUSIVENESS OF ACTION.—Conceding that neither the Presbytery nor a commission appointed by it had power to divide and apportion the moneys of the corporation, and that the division thereof is matter for the civil courts, yet the Presbytery, as an ecclesiastical court, had the power to deal with the Presbyterian church as an ecclesiastical body, in all matters ecclesiastical, and had power to dissolve and disband the church, and to divide it into two new and independent organizations, and its decisions and decrees pertaining to the church as an ecclesiastical body are not only binding upon that body, but are also binding and conclusive upon the courts, wherever and whenever material to pending litigation.

ID.—INCORPORATION OF CHURCH—CONSTRUCTION OF CODE—SUBORDINATION OF TEMPORALITIES—AGENCY—TRUST RELATION TO MEMBERS—JURISDICTION OF COURTS.—The incorporation of a church as a religious body, under the Civil Code of this state, is permitted only as a convenience to assist in the conduct of the temporalities of the church, and, notwithstanding incorporation, the ecclesiastical body is all important; and the incorporation is subordinate in the life and purposes of the church, and its function and object is to stand in the place of an agent holding title to the property and managing it in the interest of the church as an ecclesiastical body, and its position is that of a trustee, holding property for the use and enjoyment of the church, and every member of the church is a beneficiary of that trust; and courts will deal with the property of a church and enforce a trust therein in the same way, whether it is incorporated or not.

ID.—ECCLESIASTICAL DIVISION OF INCORPORATED CHURCH—DIVISION OF FUNDS IN EQUITY—EFFECT UPON CORPORATION IMMATERIAL.—The fact of incorporation of a church under the Civil Code, in accordance with its rules, regulations, and discipline, does not stand in the way of or preclude an ecclesiastical division of the church into two churches under an ecclesiastical authority having jurisdiction of that matter; and where an incorporated Presbyterian church has been thus divided by the Presbytery, a court of equity will divide a trust fund held by the corporation for the benefit of its members, *pro rata* between the two churches, according to the number of

members assigned by the Presbytery to each new church organization decreed by it to be formed; and it is immaterial to inquire whether such division will have the effect indirectly to result in the dissolution or death of the corporation or not.

APPEAL from a judgment of the Superior Court of Los Angeles County. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

A. M. Stephens, and Shirley C. Ward, for Appellants.

J. S. Chapman, and J. W. McKinley, for Respondents.

GAROUTTE, J.—The sufficiency of the complaint is the only question before the court upon this appeal, judgment having been entered upon an order sustaining a demurrer thereto. A condensed recital of the main facts disclosed by the pleading becomes necessary.

The First Presbyterian Church of Los Angeles was composed of about eight hundred members and was incorporated according to the laws of the state. As such corporation it was the owner of certain real estate, which it sold for the sum of fifty thousand dollars, approximately. It was contemplated that this fund of money should be applied to the purchase of a suitable site and the erection of a church building thereon. When the time approached for the selection of such site, unanimity of opinion was lacking, and dissensions arose. A slight majority of the members desired a particular location for the church; a large minority opposed the choice of the majority. The trustees of the corporation, representing the wishes of the majority, purchased a tract of land and proceeded toward the erection of the church. Thereupon the minority, by petition, placed the facts before the Presbytery, a church tribunal having control and supervision of the Presbyterian Churches of the city of Los Angeles. By this petition the minority asked the Presbytery to divide the First Presbyterian Church of Los Angeles as a religious body into two churches, and to make an equitable division of the aforesaid fund of money. In due course, and after hearing the respective claims of all parties interested, the Presbytery by resolution declared:

"1. That the First Presbyterian Church of Los Angeles be and

hereby is divided into two organizations; 2. That so many of the members of the First Presbyterian Church of Los Angeles whose names appear upon the petition aforesaid, and who may desire, together with as many others as may sign this petition, and those who may hereafter unite with them by letter or by confession of their faith, shall constitute a church to be known as 'the Central Presbyterian Church of Los Angeles,' or by any other name which they themselves may hereafter adopt and the Presbytery approve; 3. . . . 4. That the residue of the membership of said First Presbyterian Church of Los Angeles, California, shall also constitute a church to be known as the 'Westminster Presbyterian Church of Los Angeles,' California, or by any other name which they themselves may hereafter adopt and the Presbytery approve; 5. That the pastor of the said First Presbyterian Church of Los Angeles, the Reverend Burt Estes Howard, be now and is the pastor, and that the members of session of the First Presbyterian Church whose names do not appear upon the petition aforesaid be now and are the session of the Westminster Presbyterian Church; 7. That the records of the First Presbyterian Church of Los Angeles be given to the Westminster Presbyterian Church."

The Presbytery made a further order that a commission of five members upon due hearing apportion the aforesaid fund. This commission, upon such hearing, found that three hundred and sixty-nine members had been formed by the decree of the Presbytery into the Central Presbyterian Church, and that four hundred and twenty-two members of the original First Presbyterian Church by the decree of the Presbytery had been formed into the Westminster Presbyterian Church, and the commissioners thereupon apportioned the funds between the two new Presbyterian churches upon such basis of membership. The Central Presbyterian Church, recognizing the action of the Presbytery and in accordance with its decree, fully organized as a church of the Presbyterian denomination. The Westminster Church, not recognizing but repudiating the action of the Presbytery, did not organize as contemplated and directed by the Presbytery. The First Presbyterian Church of Los Angeles (corporation) has refused to pay over to the Central Presbyterian Church any portion of the money fund in its hands, though demand has been made.

This action is brought by N. L. Wheelock and E. F. Henderson, for themselves and on behalf of all other members of the Central Presbyterian Church of Los Angeles, to recover such proportion of this fund of money, which is claimed to be a trust fund, as the number of members of the Central Presbyterian Church bears to the entire number of members of the First Presbyterian Church. The corporation is made defendant. Certain individuals by name, who were made members of the Westminster Presbyterian Church by the action of the Presbytery, and who refused to recognize and follow such action, are also made defendants. These parties are made defendants for themselves and in behalf of all other members of the Westminster Presbyterian Church who refuse to recognize an abide by the action of the Presbytery. It is further alleged that all such members have a common and personal interest in the cause of action set forth herein, and that such members are so numerous as to render it impracticable to name them all. The trustees of the corporation are also made parties defendant.

There are technical objections made to the complaint, to the effect that there exists a lack of proper parties plaintiff, and also a defect of parties defendant. It is insisted that individual members of the Central Presbyterian Church have no standing to begin the litigation, but that its board of trustees is the proper party to inaugurate such proceeding. The Central Presbyterian Church is an unincorporated body. While it had a board of trustees, the powers and functions of that board are not set forth in the complaint and consequently we know not what they are. Leaving the question as to the right of the board of trustees to bring this action an open one the court is still firmly possessed of the opinion that the action is properly inaugurated. The plaintiffs bring the action for the benefit of all the members of the Central Presbyterian Church. In effect, each member is a party plaintiff, and that all the members could jointly bring the action we feel well assured. It is said in *Smith v. Swormstedt*, 16 How. 288: "The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and the others; and a bill may also be maintained against a portion of a numerous body of defendants representing a common

interest." *Baker v. Ducker*, 79 Cal. 365, is to the same effect. We find no defect of parties defendant.

This is an action in equity to enforce a trust against the First Presbyterian Church of Los Angeles, a corporation, in favor of the Central Presbyterian Church, or the members thereof. It may be conceded, for the purposes of the case, that neither the Presbytery nor the commission appointed by it had the power to divide and apportion the money held by the church corporation; and that the disposition of those moneys were matters for civil courts, and that ecclesiastical decrees bearing upon such disposition are not binding upon judicial tribunals. But the ecclesiastical court known as the Presbytery had the power to deal with the First Presbyterian Church in all matters ecclesiastical. The church as an ecclesiastical body was under the absolute control and dominion of the Presbytery, and the decisions and decrees of that body were as binding upon it as the decisions and decrees of this court are binding upon inferior judicial tribunals. Those decrees are not only binding upon the church as an ecclesiastical body, but they are binding and conclusive upon courts wherever and whenever material to pending litigation. (*Gaff v. Greer*, 88 Ind. 122; 45 Am. Rep. 449.) This Presbytery had the power to dissolve and disband the First Presbyterian Church and it exercised that power. The record of its action, as disclosed by the pleading, shows an effectual dissolution of the Church known as the First Presbyterian Church of Los Angeles. It was divided into two new and independent organizations. Even its church records were transferred. As a church nothing was left of it. It is apparent that many members were grieved at such results and deemed the treatment harsh, but all must bow to the law, and ecclesiastical law equally with civil law is binding in its own domain. The complaint alleges "that by virtue of such decisions, such form of government, and such book of discipline, each Presbytery has the power, upon the petition of the minority of the members of a local Presbyterian church within its territorial jurisdiction, to dissolve and divide a church into two church organizations or congregations, . . . and that such action is binding upon the church so divided and the churches so created."

The spiritual or ecclesiastical body being dissolved, what becomes of the money held by the corporation? This question

brings before us the consideration of the status of the corporation as relating to the church proper. The Civil Code of this state (original section 595) expressly permits religious bodies to incorporate, but such incorporation is only permitted as a convenience to assist in the conduct of the temporalities of the church. Notwithstanding incorporation the ecclesiastical body is still all important. The corporation is a subordinate factor in the life and purposes of the church proper. A religious corporation like the one at bar, under the laws of this state, is something peculiar to itself. Its function and object is to stand in the capacity of an agent holding the title to the property, with power to manage and control the same in accordance with the interest of the spiritual ends of the church. It is said in *Winebrenner v. Colder*, 43 Pa. St. 249: "The legislature never means by granting or allowing such charters to change the ecclesiastical status of the congregation, but only to afford them a more advantageous civil status. The directors or trustees of the corporation, as such, have no authority whatever over church affairs. These matters rest purely with the ecclesiastical body. Whatever property stands in its name is seised to the use of the church proper. It is a trustee holding property for the use and enjoyment of the church, and every member of the church is a beneficiary of that trust." "By the election which organized the corporation the title became vested in the trustees and their successors for the use of the trust, as completely as if the use had been declared by deed. . . . A trust of this character is not distinguishable in this from any other trust over which courts of equity exercise a supervisory power." (*Brunnenmeyer v. Buhre*, 32 Ill. 183.)

Without considering the status of the Westminster Presbyterian Church we have here the Central Presbyterian Church claiming a portion of this money as a beneficiary of the trust. This church is not a seceder. It has set up no antagonistic faith. It is true to the doctrine of Presbyterianism. It is faithful to the decrees of the higher ecclesiastical powers. It is in good standing as a church of that denomination. Its members were beneficiaries of the trust before the Presbytery divided the church and in justice and equity must stand in the same position after division. The Presbytery had power to divide the old

church into two other and new churches. It is exercised that power. Such exercise simply made two church beneficiaries instead of one. The old church being dissolved there is no beneficiary if the Central Presbyterian Church is not one, for the members of the old church not affiliating with these plaintiffs are certainly in no better position as to the trust fund than the plaintiffs. We see little difficulty in equity dealing with this question. Indeed equity fears no difficulty. The action of the Presbytery has rendered any further administration of the trust by the corporation if not impossible, certainly inadvisable. And a court of equity would deem it for the best interests of all concerned that the trust fund be divided. The property was held in trust for a certain church congregation. That church has been legally divided into two branches. These branches are its legal successors, and the money should be apportioned according to the numerical strength of each. This was the course adopted in *Nicholls v. Rugg*, 47 Ill. 47, 95 Am. Dec. 462, the court saying: "The property of this church has been acquired partly under one organization and partly under the other; and, inasmuch as the sole object of a court of chancery in cases of this character is to enforce a trust and hold the trust property to the purposes for which it was originally given, no fairer or more equitable mode of doing this can be devised than the one adopted by the circuit court." In *Ferraria v. Vasconcellos*, 31 Ill. 53, it is said: "The congregation were before the separation the beneficiaries under the deed, and we see no reason why they are not so still. The proceeds of the property ought, therefore, to be divided between them in the proportion which the seceding and adhering members of that congregation bear to each other in point of numbers. This will protect the rights of all parties, and is manifestly equitable and just." The chief justice of the court in a separate opinion saying: "In a case thus peculiar in its facts, differing as it does from all others which we find reported, where neither party has incurred a forfeiture, we are to apply the rules of equity and a sound morality. This can only be done by a division of the property, where the members of the church have thus become divided in numbers nearly equal." The celebrated case of *Smith v. Swormstedt*, *supra*, involving a decision of the Methodist Episcopal church, directly presents the principle

here discussed, and in that case the court said: "The division of the Methodist Episcopal church having thus taken place in pursuance of the proper authority, it carried with it as matter of law a division of the common property belonging to the ecclesiastical organization, and especially of the property in this book concern, which belonged to the traveling preachers." It is declared by the supreme court of Indiana that "the title to the property of a divided church is in that part of the organization which is acting in harmony with its own law." (*White Lick etc. v. White Lick etc.*, 89 Ind. 136.) In the somewhat celebrated case of *Watson v. Jones*, 13 Wall. 736, a case which directly involves the principles of law at issue here, the court said: "Here is no case of property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner to the support of any special religious dogmas or any peculiar form of worship, but of property purchased for the use of religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property. In the case of an independent congregation, we have pointed out how this identity or succession is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments."

Counsel for defendants in effect concede the general propositions advanced by these cases as sound, but claim in substance that this doctrine can only apply to unincorporated churches. It is insisted that the First Presbyterian Church being incorporated the fact of incorporation stands as a lion in the path absolutely prohibiting any application of the doctrine of a *pro rata* division of the property. It is declared that the action of the Presbytery in dissolving the church, taken in connection with the decision of the court here prayed for, would result in an absolute dissolution of the corporation, and it is contended that a corporation under the laws of this state cannot be dissolved in that way. The trial court took this view of the case, and upon this ground sustained a general demurrer to the complaint. In this connection plaintiffs claim that the corporation consists of the trustees

of the church alone. Defendants claim that every member of the church is a member of the corporation. But the solution of this contention does not appear to be material. A corporation composed simply of the trustees, or of all the members, is still a body separate and distinct from the church proper, and, even though each individual stands in the dual capacity of a member of the corporation and a member of the church proper, still the conditions are not altered thereby. The two bodies are as separate and distinct as though the trustees alone constituted the corporation. Again, we are not particularly concerned whether or not the action of the Presbytery and the court indirectly result in the dissolution of the corporation. The Presbytery had the power to deal with the church, and the court certainly has the power to deal with the property; and if the exercise of these powers result in death to the corporation, what of it? It is apparent that its usefulness is gone any way. Defendants' contention of necessity results in the maintenance of the proposition that where church property stands in the name of the corporation the Presbytery has no power to dissolve or divide the church. This cannot be so. The act of incorporation does not infringe or limit the powers possessed by the Presbytery, for that body possesses no powers which form the subject matter of state legislation. And we know of no reason why courts will not deal with the property of a church in the same way, whether incorporated or not; and, likewise, Presbyteries have the power to deal with the ecclesiastical body regardless of any question of incorporation.

Defendants rely upon certain decisions of the courts of New York, Michigan, and Wisconsin. (*Robertson v. Bullion*, 11 N. Y. 243; *Wilson v. Livingstone*, 99 Mich. 594; *Fadness v. Braunborg*, 73 Wis. 257.) In answer to the doctrine of these cases, counsel for plaintiffs have well pointed out that under the law of those states permanent trusts for charitable and religious uses are void. Hence, corporations formed by religious societies could not hold property at all if a trust attached. But the case of *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82, reviews these authorities, and holds them to be authority only where similar statutes are to be found. That case, it may be said, goes to the full limit of holding the existence of a trust relation between the church proper

and the corporation. In this state, under a section of the Civil Code we have heretofore cited, religious bodies can only be incorporated in accordance with their rules, regulations, and discipline. The cases from the three states mentioned go away beyond the doctrine laid down in this state. The Michigan case especially declares that a majority of the members may control the property of the corporation, and practically that the title of the property of the corporation follows that majority wherever it may lead and however often and radical a change of faith overtakes it. In this state we take the other view. In *Baker v. Ducker, supra*, a case involving the property rights of the members of an incorporated church, this court said: "It is thus made clear that the property in question was held by the Reformed church in trust for its members, and the defendants, even though they constituted a majority of the members, had no right and no power to divert it to the use of another and different church organization."

For the foregoing reasons the judgment is reversed and the cause remanded, with directions to overrule the demurrer.

Harrison, J., Temple, J., Van Fleet, J., and Henshaw, J., concurred.

Rehearing denied.

[Crim. No. 383. In Bank.—December 30, 1897.]

Ex parte R. W. RUFFIN on Habeas Corpus.

CRIMINAL LAW—DEFAUDING INNKEEPER—STATUTE NOT REPEALED—HABEAS CORPUS.—The act of March 1, 1889, adding a new section to the Penal Code, known as section 537, relating to defrauding proprietors and managers of hotels, inns, restaurants, boarding-houses, and lodging-houses, was not repealed by an amendment to another section 537 of the Penal Code established by the act of March 10, 1887, relative to personal property mortgaged, such amendatory act relating to the subject matter of the removal, sale, or subsequent encumbrance of mortgaged chattels; and a person convicted of the crime of defrauding an innkeeper under the act of March 1, 1889, subsequent to said amendatory act, cannot be released upon *habeas corpus*, upon the ground that the act defining the crime was repealed, nor upon the ground that the act of March 1, 1889, was unconstitutional.

APPLICATION for writ of *habeas corpus* from the Supreme Court to the sheriff of the City and County of San Francisco, to test the validity of a judgment of conviction of the Police Court of said City and County. Charles T. Conlan, Judge.

The facts are stated in the opinion of the court.

Robert Ash, and George Hayford, for Petitioner.

THE COURT.—The petitioner is imprisoned under a judgment convicting him of defrauding an innkeeper. He demands his release upon the ground that the statute creating the offense has been repealed.

On March 10, 1887, a statute was enacted under the following title: "An act to add a new section to the Penal Code, to be known as section 537, relative to personal property mortgaged."

March 1, 1889, another statute was enacted under the following title: "An act to add a new section to the Penal Code, to be known as section 537, relating to defrauding proprietors and managers of hotels, inns, restaurants, boarding-houses, and lodging-houses."

By these statutes two new sections were added to the Penal Code, each numbered 537.

March 9, 1893, another statute was enacted under the following title: "An act to amend section 537 of the Penal Code and to add a new section thereto, to be known and designated as section 538, relating to the removal, sale, or subsequent encumbrance of mortgaged chattels."

The contention on the part of petitioner is that this last cited act, which relates exclusively to the subject indicated by its title, repealed the act of 1889, by which the crime of defrauding innkeepers was defined, as well as the act of 1887, defining the crime of defrauding mortgagees of personal property. We think it clear that it repealed only the last-mentioned act.

There is no merit in the further contention that the act of 1889 is unconstitutional.

Writ denied.

Rehearing denied.

[Sac. No. 411. Department One.—December 31, 1897.]

In the Matter of the Estate of GEORGE M. KASSON, Deceased. CLARK McCHESNEY, as Executor, etc., Appellant, v. J. M. KNOX, Respondent.

ESTATES OF DECEASED PERSONS—SUBSTITUTION OF ATTORNEYS—ALLOWANCE OF COUNSELL FEE—JURISDICTION—NOTICE OF HEARING—APPEARANCE OF PARTIES—RECITAL IN ORDER—OBJECTION UPON APPEAL.—After the substitution of attorneys for an executor has been ordered, the court has jurisdiction to allow a counsel fee to the retiring attorney in advance of the final settlement of the estate; and where the executor appealing from the order of allowance, and all persons interested in the estate appeared and took part in the proceedings upon the application for such allowance, and the order of allowance so recited, and there is nothing in the record upon appeal of the executor to contradict such recital, it must be taken as true, and a general claim of want of jurisdiction to make the order cannot be supported upon such appeal, for the first time, upon the ground of the lack of service of formal notice of the hearing upon the parties interested.

ID.—EFFECT OF ALLOWANCE OF COUNSEL FEES—LIABILITY OF ESTATE—CONTRACT WITH EXECUTOR—PERSONAL LIABILITY—RELEASE—PAYMENT—ACQUITTAL OF EXECUTOR.—The determination of the court in allowing counsel fees to an attorney is not a determination of the contract made by the executor and attorney as to the fee to be paid, but relates simply to the amount of fee the estate should be held to pay, and, if any greater amount is agreed upon, it is purely a personal matter between the contracting parties; and where the amount allowed is not less than the sum agreed upon, and by the contract of the parties the fee was to be fixed by the court according to the value of the services rendered, such agreement is in effect a perfect release of the executor from any personal liability for an attorney's fee; and in such case an allowance of a fee to the attorney by the court, and its payment by the executor to the attorney after such allowance, will acquit the executor of liability to the estate as to that matter in the future settlement of his accounts.

APPEAL from an order of the Superior Court of San Joaquin County allowing an attorney's fee against the estate of decedent. Joseph H. Budd, Judge.

The facts are stated in the opinion of the court.

John S. Percy, for Appellant.

J. W. Knox, Respondent, in Person.

GAROUTTE, J.—The executor has appealed from an order of the probate court allowing him for the use of the attorney who had previously represented him in the management of the estate a fee of three thousand dollars. During the progress of the administration the executor asked for a substitution of attorneys. At the hearing of this application, Knox, the previously acting attorney for the executor, appeared and asked the court to make an allowance out of the funds of the estate to the extent of the value of the services he had rendered. A substitution of attorneys was ordered, and subsequently thereto the court made the order from which this appeal is taken.

Appellant makes the point that the order of allowance was made without notice, and therefore without the jurisdiction of the court. But, as against this contention, it may be said that a hearing of the matter was had, an opposition upon the part of the legatees and devisees was filed, and evidence taken. To be sure, this written opposition insisted that the court had no jurisdiction to fix the amount of compensation to be allowed the executor as an attorney's fee; but such a general claim of want of jurisdiction cannot be supported here for the first time upon the ground of lack of service of some character of notice of the hearing upon the parties interested. Again, in the order and decree making the allowance, it is recited that "at the hearing of said petition by the court the said executor of the will of said deceased, all persons interested in the estate of said deceased, or claiming an interest therein, or to whom distribution thereof should be made, all devisees and legatees under the will of said deceased, the next of kin of said deceased, all unpaid claimants against said estate, and all creditors of said deceased, were present by their representatives and attorneys or personally, and took part in the proceedings had upon said application." The record before us presents no contradiction of this recital, and it must be taken as true.

It is next claimed that the court had no power in this proceeding to determine the amount to be allowed the executor as an attorney's fee. We see no good reason why such power did not exist. It certainly is a usual and ordinary practice. The determination of the court was not, as appellant would seem to think, a determination of the character of the contract made by the

executor and attorney as to the amount of fee the attorney was to be paid for his services. Upon the contrary, the determination of the court was simply as to the amount of fee the estate should be held to pay. If the executor agreed to pay an amount in excess of that sum, then such excess became a purely personal matter between the contracting parties. If, by special contract with the executor, the attorney had agreed to perform the services for a specified sum, which was less than the court might deem the services worth to the estate, then another question would be presented, but there is no such question here, and no showing to that effect. Upon the contrary, by the contract of the parties the fee was to be fixed by the court according to the value of the services rendered, and such an agreement was in effect a perfect release of the executor from any personal liability whatever for an attorney's fee.

By appellant's last contention it is claimed that the court could not settle the executor's account by piecemeal, and that this attorney's fee should have been fixed when an account was presented to the court for settlement. There is no good reason for such a course of procedure. Often it may be the better practice and more convenient, but there is no absolute rule of law requiring it. Substantially the identical course here pursued would have been followed when the hearing of the account came on before the court. The amount of the attorney's fee could not be set forth in the account, for the court had not yet fixed the amount; but upon the hearing, after taking evidence as to the value of the service, the court would have fixed the amount and have settled the account, with such amount inserted therein. Under the circumstances here presented, a payment of this fee to the attorney by the executor will acquit the executor of liability to the estate as to that matter.

For the foregoing reasons the order appealed from is affirmed.

Harrison, J., and Van Fleet, J., concurred.

[S. F. No. 861. Department Two.—December 31, 1897.]

THOMAS C. STERRETT, Respondent, v. J. H. BARKER, Administrator, etc., Appellant.

ESTATES OF DECEASED PERSONS—POWER OF EXECUTOR OR ADMINISTRATOR TO BIND ESTATE—PERSONAL LIABILITY—REIMBURSEMENT.—The estate of a deceased person can neither be held liable in damages for a tort committed nor for a breach of contract entered into by an executor or administrator; nor can an executor or administrator create a debt against the estate, other than for funeral expenses and expenses of administration, or borrow money upon the credit of the estate, or create any obligation which will give a right of action against the estate, except when expressly authorized by the will or by statute, and, even when the executor is authorized to carry on business, the creditor must look to the executor personally, the right to hold the estate in such case being in the representative only; and on contracts made by executors or administrators for necessary matters relating to the estate, they are personally liable, and must see to it that they are reimbursed out of the assets.

ID.—INSUFFICIENT COMPLAINT AGAINST ESTATE—SALE OF SHEEP BY EXECUTRIX—LEASE TO EXECUTRIX—REFUSAL TO DELIVERY—DAMAGE—COUNT FOR MONEY PAID.—A complaint against an administrator of the estate of a testator, with the will annexed, setting forth that the property of the estate was given to the executrix in trust with power to sell, without obtaining an order of court, and that she, for a consideration paid by plaintiff, sold and agreed to deliver to plaintiff a band of sheep in her possession as executrix, and that plaintiff leased the same to the executrix, to be surrendered when called for, together with one-half of the increase and one-half of the wool produced, and alleging that the executrix resigned, and that defendant was appointed administrator with the will annexed, and took possession of the sheep and refused to deliver them on demand, and stating the value of the sheep, lambs, and wool, and the number of lambs, and that plaintiff's damage by the refusal of defendant to deliver the sheep and carry out the agreement concerning the sale and delivery of the sheep, and the increase thereof, and the wool therefrom, was the sum of two thousand and fifty dollars, states no cause of action against the estate, whether it be construed as suing for a conversion by the defendant, or for damages for breach of the contract entered into by the executrix; and a count for money received by the executrix, and paid, laid out, and expended by plaintiff for the benefit of the estate while she was executrix shows no liability on the part of the estate to the plaintiff.

ID.—ACTION AGAINST ADMINISTRATOR—EXCLUSION OF PERSONAL LIABILITY—IMPROPER AMENDMENT.—The only way in which an action can be brought against an estate is to sue the administrator or executor in his representative capacity, and the rule is, that he can-

not be sued in the same action upon his individual or personal liability, and in his representative capacity; nor can a complaint brought against him in his representative capacity be amended so as to constitute an action against the executor or administrator individually, as such amendment would be an entire change of the party defendant, and a different suit.

APPEAL from a judgment of the Superior Court of Mendocino County and from an order denying a new trial. R. McGarvey, Judge.

The facts are stated in the opinion of the court.

Seawell & Pemberton, for Appellant.

Crandall & Bull, for Respondent.

TEMPLE, J.—The questions involved in this appeal arise upon demurrer to the complaint and upon the contention that the judgment is not warranted by the findings. I think all these points are well taken.

The complaint contains two counts. In the first, after stating the death of the testator, the probate of the will, and appointment and qualification of the executrix, and that all the property of the estate was given to her in trust with power to sell without obtaining an order authorizing her so to do, it is averred that she, for a good and valid consideration to her in hand paid by plaintiff, sold and agreed to deliver to plaintiff five hundred of the best sheep of a band of eight hundred then in her possession as such executrix; and that shortly thereafter "plaintiff leased and let said five hundred sheep to said executrix upon the following terms: The said executrix agreed to take, care for, and keep said sheep so sold to said plaintiff as aforesaid, and when said plaintiff should call for the same agreed to surrender and deliver over to said plaintiff said five hundred head of sheep, together with one-half the increase thereof and one-half the wool produced by said sheep."

It is shown by the allegations that subsequently the executrix resigned and defendant was appointed administrator with the will annexed about April 1, 1896, and immediately took possession of the assets of the estate and of the sheep, including the number purchased by plaintiff.

It is then averred that plaintiff demanded from defendant the sheep, the increase, and wool, but that defendant refused to deliver the same; that the sheep were worth three dollars and fifty cents each, the lambs one dollar each, and that the sheep had produced three hundred dollars worth of wool and three hundred lambs, the full value being nineteen hundred dollars, and that plaintiff's damage, by the refusal of defendant to deliver the sheep and carry out the agreement concerning the sale and delivery of the sheep, and the increase thereof and the wool therefrom, is the sum of two thousand and fifty dollars.

An administrator, like a trustee of an express trust, can sue or be sued without joining his beneficiaries. The only way in which an action can be brought against an estate is to sue the administrator or executor in his representative capacity. The rule is that he cannot be sued in the same action *de bonis propriis* and *de bonis testatoris* or *intestatoris*.

It is agreed here that the action is against the estate. The pleader seems purposely to have left it doubtful whether he is suing for a conversion or for damages for a breach of a contract entered into by the executrix. In neither view, however, can the estate be held liable. The estate cannot be held liable for a tort committed by an administrator or executor. (*Eustace v. Johns*, 38 Cal. 3.) Nor can the estate be held liable in damages for the breach of a contract entered into by an executor. I doubt the power of the executrix to bind the estate by a contract for a future sale, even though the will authorized her to sell. This would not seem to answer the purpose in conferring the authority upon one whose only function is to pay debts and hold the property for final distribution. The power is given to facilitate administration, and not to enable the representative to carry on business. But even in the latter case, when the executor is authorized to carry on business, the creditor must look to the executor personally. The right to hold the estate is in the representative only. (See Schouler's *Executors and Administrators*, secs. 256, 257.)

If the sale was complete and the property belonged to the plaintiff, he could have brought suit against anyone who wrongfully detained it, and could thus have recovered his property. Had the defendant been sued individually he could have defend-

ed under his claim as executor. Had he failed, however, the judgment would have been against him and not against the estate.

In the second count it is charged that between the first day of April, 1895, and the first day of June, 1895, while Mahulda Catharine Angle was executrix, "she as such executrix, and the said estate of Rench Angle became indebted to plaintiff in the sum of one thousand dollars, on account of money received, paid, laid out, and expended for the benefit of said estate."

This allegation shows no liability on the part of the estate to plaintiff. The executrix had no power as such to create a debt against the deceased. "Indeed, the rule is that executors and administrators cannot, by virtue of their general powers as such, make any contract which will bind the estate and authorize a judgment *de bonis decedentis*. But on contracts made by them for necessary matters relating to the estate they are personally liable, and must see to it that they are reimbursed out of the assets." (Schouler on Executors and Administrators, sec. 256, and numerous authorities there cited.)

There are doubtless exceptions to this rule, such as funeral expenses, clerk's fees, etc., but neither an executor nor an administrator can borrow money on the credit of the estate. He cannot, except when expressly authorized by the will or statute, create an obligation which will give a right of action against the estate.

The findings do not follow either count in the complaint, but state a different cause of action. For the reasons above stated, however, it is plain that they do not state facts which would support a judgment against the estate. (See, also, *Austin v. Munro*, 47 N. Y. 360.)

This case also holds that the complaint cannot be amended so as to constitute an action against the executor individually. It would be an entire change of the party defendant, and a different suit.

The judgment is reversed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[Crim. No. 373. In Bank.—December 31, 1897.]

Ex Parte JONIE BECKNELL on Habeas Corpus.

HABEAS CORPUS—UNLAWFUL COMMITMENT OF MINOR TO WHITTIER STATE SCHOOL—CHARGE OF BURGLARY—ABSENCE OF JURY TRIAL—FAILURE TO NOTIFY PARENTS.—Where a minor was accused before the grand jury of the crime of burglary, and, upon recommendation of the grand jury, was committed by the superior court to the custody of the Whittier State School, without trial by jury, and upon evidence taken before the court in the absence of the parents, who were not notified of the hearing, such commitment is void, and the minor must be discharged upon *habeas corpus* from the custody of the superintendent of said state school, and restored to the custody of his parents.

ID.—ACCUSATION OF CRIME—RIGHT TO JURY TRIAL—CHANGE OF GUARDIANSHIP OF MINORS—PARTIES.—A minor accused of crime cannot be committed as a criminal to the Whittier State School without a trial by jury; nor can such minor be awarded to the guardianship of such school, as against his parents, who are his natural guardians, except in a proceeding in which they are made parties, and in which it is shown that they are unfit, or unwilling, or unable to perform their parental duties.

WRIT of *habeas corpus* from the Supreme Court to the Superintendent of Whittier State School, to test the validity of a commitment from the Superior Court of Merced County. J. K. Law, Judge.

The facts are stated in the opinion of the court.

Frank H. Farrar, for Petitioner.

W. F. Fitzgerald, Attorney General, and W. H. Anderson, Assistant Attorney General, for Respondent.

BEATTY, C. J.—By section 13 of the act of March 23, 1893, relating to the Whittier State School (Stats. 1893, p. 332), section 17 of the original act was amended so as to read as follows: "If any accusation of the commission of any crime shall be made against any minor, under the age of eighteen years, before any grand jury, and the charge appears to be supported by evidence sufficient to put the accused upon trial, the grand jury may, in their discretion, instead of finding an indictment against the accused, return to the superior court that it appears to them that the accused is a suitable person to be committed to the care and

guardianship of said institution. The court may thereupon order such commitment, if satisfied from the evidence that such commitment ought to be made, which examination may be waived by the parent or guardian of such minor."

Acting under this provision of the statute the grand jury of Merced county made a presentment to the superior court as follows:

"To the judge of the superior court of the county of Merced, state of California: An accusation against Jonie Becknell, a minor under the age of eighteen years, to-wit, of the age of thirteen years, charging the said Jonie Becknell with the crime of burglary, committed in Merced county, state of California, on or about the first day of August, 1897, and the charge appearing to the grand jury to be supported by evidence sufficient to put the said Jonie Becknell upon his trial therefor, and it appearing to said grand jury that the accused is a suitable person to be committed to the care and guardianship of the reform school for juvenile offenders at Whittier, the grand jury therefore recommend that said Jonie Becknell be committed to the care and guardianship of said institution."

Thereupon the court directed the said Jonie Becknell to be brought into court, and, against his special protest and objection, on the ground that the court had no jurisdiction to act in the matter, proceeded to take testimony for the purpose of determining whether said Jonie Becknell was a suitable person to be committed to the Whittier State School.

Upon the testimony so taken, and without any other proceeding or any trial by jury, the court did adjudge the said Jonie Becknell to be a suitable person to be committed to the Whittier State School until he should reach his majority, and made an order accordingly, under which he is now held in the custody of the superintendent of the school. The boy is under fourteen years of age, his father and mother are residents of Merced county and are able and willing to provide for his support and education.

Upon this state of facts appearing on the return to the writ of *habeas corpus*, issued upon petition of the boy's father, we are asked to discharge him from custody.

The petition must be granted. As a judgment of imprison-

ment the order of the superior court is void. The boy cannot be imprisoned as a criminal without a trial by jury. As an award of guardianship it is equally void, for his parents—his natural guardians—cannot be deprived of their right to his care, custody, society, and services except by a proceeding to which they are made parties, and in which it is shown that they are unfit or unwilling or unable to perform their parental duties.

All the cases cited by counsel are consistent with, and several of them sustain, these views.

The minor is discharged from the custody of the superintendent and restored to the custody of the petitioner.

Van Fleet, J., Temple, J., McFarland, J., and Henshaw, J., concurred.

[S. F. No. 680. Department One.—December 31, 1897.]

In the Matter of the Estate of GIOVANNI DEVINCENZI,
Deceased, A. DEVINCENZI, Administrator, Appellant, v.
LUIGI FIGONE, Respondent.

ESTATES OF DECEASED PERSONS—ORDER OF SALE—SUFFICIENCY OF PETITION—COLLATERAL ATTACK UPON ORDER.—An order of sale of real property belonging to the estate of a deceased person is an appealable order and cannot be collaterally attacked for any objection to the petition upon which the order was made, which might have been corrected upon a direct appeal therefrom, unless such petition is so defective that the court did not acquire jurisdiction to make the order; and an objection made by the purchaser at the sale to an order confirming it, upon the ground that the petition for the sale did not properly state the condition of the property ordered sold, is a collateral attack upon the order of sale.

ID.—INDEFINITE STATEMENT AS TO CONDITION OF PROPERTY—JURISDICTION—COLLATERAL ATTACK BY PURCHASER.—Where the petition for the order of sale set forth a full description of the property, showing that it was improved, and stated that its condition was "fair," and that its value was four thousand dollars, such indefinite statement of its condition, though it might have been objected to at the hearing on the ground of uncertainty, was sufficient to give the court jurisdiction to determine the sufficiency of the petition, and to receive evidence as to the condition of the property, and to make a valid order of sale, which cannot be collaterally attacked by the purchaser at the sale for insufficiency of the petition.

ID.—DECREE OF PARTICULARITY REQUIRED—SALE OF SINGLE PARCEL.—

The sufficiency of the particulars of the condition of the property which should be set forth in a petition for an order of sale of real estate of a decedent must be determined by the circumstances of each case; and where it is shown to be necessary to make a sale of property for the purpose of paying claims, and the estate consisted of a single piece of real property, a court would require less particularity in the petition than where the estate comprises several pieces of property, and it is required to direct the sale of only one.

APPEAL from an order of the Superior Court of the City and County of San Francisco, denying confirmation of the sale of the real estate of a decedent, and annulling the sale and vacating the proceedings had under the petition for the order of sale, and directing return of the amount deposited by the purchaser. Charles W. Slack, Judge.

The facts are stated in the opinion of the court.

James A. Devoto, for Appellant.

T. M. Osmont, for Respondent.

HARRISON, J.—Under an order made by the superior court for the sale of certain real property belonging to the estate of the above-named decedent, the administrator sold the same to the respondent and thereafter made a return of his proceedings and asked for a confirmation of the sale. Upon the hearing the purchaser objected to the confirmation, and asked that the sale be set aside, upon the ground that the petition for the order of sale was defective in not sufficiently setting forth the condition of the property. No other objection was made to the regularity of the proceedings for the sale. The court held that the petition was defective, set aside the proceedings thereunder, and vacated the sale to the respondent. From this order the administrator has appealed.

The objection made to the petition by the respondent in the proceeding appealed from is a collateral attack upon the order of sale, as much so as if it had been made in any other proceeding to enforce a contract of sale where the validity of the order was involved. (*Matter of Dolan*, 88 N. Y. 309; *Wing v. Dodge*, 80 Ill. 564; *Van Fleet on Collateral Attack*, sec. 7.) The order of sale was made May 12, 1896, and was an appealable order. Any

error that the court may have committed in making it could have been corrected upon a direct appeal therefrom. If, however, the petition upon which the order was made is so defective that the court did not acquire jurisdiction, the order may be assailed at any time upon a collateral as well as upon a direct attack; but, if the facts stated in the petition were sufficient to confer jurisdiction upon the court to hear the application, its order directing a sale cannot be impeached upon a collateral attack. (*Morrow v. Weed*, 4 Iowa, 77; 66 Am. Dec. 122; *Bryan v. Bauder*, 23 Kan. 95; *Burris v. Kennedy*, 108 Cal. 331.)

In the petition for the sale, the administrator stated "that a full description of all the real estate of which the said decedent died seised, or in which he had any interest, or in which the said estate has acquired any interest, and the condition and value of the said real estate, are set forth in the schedule marked 'D,' hereunto attached and made a part of this petition." In the schedule referred to, the property was described as "an undivided one-half interest in that certain piece or parcel of land, with the improvements," giving the boundaries of the lot and stating that its condition was "fair," and its value four thousand nine hundred dollars. Upon this petition, and after proof that notice of the hearing had been given as required by law, the court made its order of sale.

It appears from the description of the property thus given that it was improved, and the petition purported to state its condition, and, although the statement was not very definite, and might have been objected to at the hearing on the ground of uncertainty, no objection was made. As the petition, although defective in its allegations, contained a statement which purported to set forth the condition of the property, the attention of the court was challenged to its merits, and it was authorized to determine whether the statement was sufficient. The court had jurisdiction to determine whether a statement that the condition of the property was "fair" was sufficient, and, even though it had erred in its conclusion, its judgment was not void. There was a sufficient statement to authorize the court to receive evidence in reference to the condition of the property, and to determine whether, in view of the condition of the estate, it would

authorize its sale. The statute does not specify any particulars of the condition of the property which are to be set forth in the petition, and the sufficiency of the particulars in a petition must be determined by the circumstances of each case. In a case like the present, where it was shown to be necessary to make a sale of some of the property of the estate for the purpose of paying claims against it, and the estate of the decedent consisted of a single piece of real property, a court would require less particularity in the petition than where the estate comprised several pieces of property, and it was required to direct the sale of only one (*Burris v. Kennedy, supra*), since in the latter case, as was said in *Estate of Smith*, 51 Cal. 563, "such information is necessary to enable the court to intelligently exercise its judgment in the selection of the property of the estate which can be most advantageously sold." It is to be observed, moreover, that in the estate of Smith the question arose upon a direct appeal from the order of sale, and what is there said is inapplicable where the question arises upon a collateral attack.

It must be held, therefore, that the petition sufficiently stated the facts necessary to give jurisdiction to the court, and that its order thereon, being a judicial determination in a proceeding of which it had jurisdiction over the subject matter and the parties interested therein, is not subject to a collateral attack.

The order is reversed.

Garoutte, J., and Van Fleet, J., concurred.

[Crim. No. 312. Department Two.—January 4, 1898.]

THE PEOPLE, Respondent, v. TILLIO LUCHETTI, Appellant.

CRIMINAL LAW—LARCENY—EVIDENCE—RECENT POSSESSION OF STOLEN COW—EXPLANATION—QUESTION FOR JURY.—The possession by the defendant on the morning after the theft of a stolen cow, which the defendant was accused of stealing, is *prima facie* evidence of guilty possession, and is a circumstance, to be taken in connection with other corroborating circumstances, tending to show guilt of the larceny alleged, unless satisfactorily explained; and where the de-

defendant undertook to explain the possession as having been transferred to him by another person, under circumstances detailed by him, and it could not be said that his explanation was so clearly and evidently true that the jury could not find against it except under the influence of passion or prejudice, but there was evidence from which they might rightly conclude that the explanation was fabricated, the question whether his explanation was true and reasonable or fabricated was a question for the jury to determine, and their verdict of guilty cannot be disturbed on the ground that the inference of guilt was removed by the explanation given by the defendant of the circumstances attending his possession.

ID.—SALE OF COW TO BUTCHER—EVIDENCE OF PREVIOUS PROPOSAL TO SELL—ABSENCE OF REBUTTAL.—It appearing that the stolen cow was sold by the defendant to a butcher on the morning after the theft, the testimony of the butcher that about a week previously the defendant asked the butcher if he did not wish to buy a cow, tended, in some degree, to render improbable the defendant's explanation of his possession of the cow sold, and is not too remote to be inadmissible, and it being in the power of the defendant to rebut such inference if not correct, the failure of the defendant to offer evidence to show that he had in his possession another cow which he was proposing to sell the week previous added to the improbability of his testimony.

ID.—INSTRUCTIONS—POSSESSION OF STOLEN PROPERTY—"GUILTY CIRCUMSTANCE."—The use of the words "guilty circumstance," instead of the words "a circumstance tending to show guilt," in an instruction as to the effect of the unexplained possession of stolen property soon after the taking, could not be misleading to the jury, where other instructions on that subject were such as must have corrected any erroneous impression made upon the minds of the jurors.

ID.—MODIFICATION OF INSTRUCTION—DISCREDITING OF FALSE WITNESS. Where the defendant requested an instruction substantially covering the provision of section 2061, subdivision 3, of the Code of Civil Procedure, that "a witness false in one part of his testimony is to be distrusted in others," a modification of the instruction by the word "willfully" before the word "false" did not render the instruction erroneous, nor change the effect of the instruction as offered.

ID.—INSTRUCTION TAKING CASE FROM JURY—IMPROPER REQUEST.—Where there was evidence sufficient to sustain a verdict of guilty of larceny, an instruction requested that there was no evidence that the defendant participated in the actual stealing of the cow, and that the evidence only showed that defendant sold property alleged to have been stolen, and that defendant could not be convicted upon that evidence, would have taken the case from the jury, and was properly refused.

ID.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—LACK OF DILIGENCE.—A new trial will not be granted for newly-discovered evidence, where it appears that what the witness could have testified to was well known to the defendant before the trial, and no steps were taken to secure his attendance at the trial, and the lack of diligence in that

regard was such that the defendant, though stating to the court a desire for his evidence, did not insist upon a postponement to secure it.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion.

Appel & Whitney, and A. M. Niles, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

HAYNES, C.—Appellant was convicted of grand larceny, and, his motion for a new trial having been denied, he was sentenced to imprisonment for the term of five years. This appeal is from the judgment and the order denying a new trial. All the questions in the case are presented by the motion for a new trial.

The evidence tended to show that the cow (the property alleged to have been stolen) was, by the owner, securely tied to a tree in the owner's lot, in the city of Los Angeles, with a chain and halter, on the evening of October 28th, and was missed the next morning, and about 9 o'clock that morning was sold to a butcher in the same city by the defendant. No question is made as to a larceny having been committed by some one, and that the defendant sold the cow to the butcher is admitted.

The defendant testified in his own behalf, in substance, that he left Monrovia about 1 o'clock in the morning to come to Los Angeles to see his sweetheart, using his stepfather's horse and wagon; that about 5 o'clock he overtook Joe Riverio, on New Main street, leading the cow that was sold to Mr. Sentous, the butcher; that Riverio spoke to him about selling the cow in the country; that he asked Riverio to ride, that Riverio got on the wagon and the cow gave a jerk and broke the hind wheel off the wagon; that Riverio said, "Now I broke the wheel off your wagon, you can sell the cow and get five dollars and fix your wheel;" that he saw Valencia, an officer, and spoke to him; that he was then leading his horse with the harness on, and "the man was behind me;" that he took his horse to the Mariposa

barn and about 9 o'clock went to the Roma hotel "to meet this fellow" to get money to fix his wheel, and he told him to go and sell the cow, and that he then sold the cow to Mr. Sentous; that when he first went to the butcher shop Riverio was with him, but not when he went the second time and sold the cow; that he sold the cow in Riverio's name, and signed Riverio's name to the bill of sale because he told him to sell the cow.

Upon cross-examination, he testified that he knew Riverio well, that the last time he saw him was the day he sold the cow; that Riverio used to run a tamale stand in Los Angeles; that he did not ask him where he got the cow; that he said he was working in San Gabriel and they gave him the cow for his work.

It does not appear that the defendant made or caused to be made any effort to procure the presence or arrest of Riverio. The policeman, Valencia, whom he said he saw and spoke to on the street between 4 and 5 o'clock in the morning, while he was leading his horse and Riverio the cow, was not examined as a witness. He was subpoenaed by the prosecution, was present at the trial in the morning, but was permitted by the officer to go away with the promise that if he should be needed he would be sent for. It does not appear that he was informed by any one that the defendant desired his presence or intended to call him as a witness. When about to close the evidence on the part of the defendant, his attorney said: "I would like to put on Mr. Valencia, but if the court thinks I have not shown diligence, I cannot insist upon it;" and the case was closed without Valencia's presence, and without any request for delay, or any further effort to secure his testimony.

Several points were made for reversal, but these will be noticed in a different order from that in which they are presented by appellant.

1. It is contended that the evidence is insufficient to justify the verdict. The evidence in this case is wholly circumstantial. No one saw the cow taken from the owner's lot. It was found in defendant's possession early the next morning, and hence the question is presented as to the effect to be given to such possession and the defendant's explanation of the fact of his possession.

It is said by Greenleaf: "As men generally own the personal

property they possess, proof of possession is presumptive proof of ownership. But possession of the fruits of crime recently after its commission, is *prima facie* evidence of guilty possession." (1 Greenleaf on Evidence, sec. 34.)

But there may be "guilty possession" in one who did not commit the larceny, as in the case of the receiver of stolen goods, knowing them to have been stolen, or there may be an innocent possessor of stolen goods, as, in this case, the butcher, who purchased the cow, and who, the circumstances all show, could have been neither the thief nor the guilty receiver of stolen goods.

The learned author above quoted further says: "In the next place, in order to justify the inference of guilt from the possession of the instruments or fruits of crime, it is important that it be a recent possession, or so soon after the commission of the crime as to be at first view not perfectly consistent with innocence. In the case of larceny, the nature of the goods is material to be considered; since, if they are such as pass readily from hand to hand, the possession, to authorize any suspicion of guilt, ought to be much more recent than though they were of a kind that circulates more slowly, or is rarely transmitted." The author then cites a case where the prisoner was held to account for his possession of goods stolen two months before they were found in his possession, and other cases of property of a different character found in possession of the accused after a longer interval where an acquittal was directed, and adds: "But in other cases the whole matter has properly been left at large to the jury, it being their province to consider what weight, if any, ought to be given to the evidence." (3 Greenleaf on Evidence, sec. 32.)

Appellant contends that having given a reasonable account of the circumstances attending his possession of the cow, that it removes the inference of guilt, and that therefore the verdict should have been in his favor. But whether the account he gave was either true or reasonable was for the jury to determine, and in such case we cannot disturb the verdict, unless we can say that his explanation of his possession was so clearly and evidently true that the opposite conclusion could only be reached by a jury under the influence of passion or prejudice. We think the jury rightly concluded that his story was fabricated, and,

therefore, that he was guilty of the larceny. In this connection and as tending strongly to justify this conclusion of the jury, we may add to the facts already stated the testimony of Mr. Sentous, a witness called for the prosecution, who testified that about a week before he bought the cow the defendant came and asked if he wanted to buy a fat cow, which he said was on Pasadena avenue, five or six miles away; that Sentous replied he would not go so far to see it, but "you bring the cow, and if it suits me I will buy it." If the defendant had made this inquiry the day before he brought the stolen cow to Mr. Sentous it would have been cogent evidence that he, and not another, had committed the larceny; and, while the lapse of a week would somewhat weaken its force, it clearly tends, in the absence of any explanation, to connect him with the taking. It would very naturally lead Mr. Sentous to suppose that the cow he brought and sold to him was the one about which he had spoken a week before, and, if so, we do not see why it should not properly have the same effect upon the jury. If he owned a cow on Pasadena avenue, five or six miles from the city, it was in his power to show that fact, and thus remove the inference; and his failure to do so greatly added to the improbability of his testimony as to the circumstances under which he obtained possession of the stolen property.

In this connection, we may notice defendant's objection to the said testimony of Mr. Sentous, which was based upon the ground that it occurred prior to the larceny. This objection was properly overruled for reasons above stated. The time was not so remote as to make it inadmissible.

2. At the request of the prosecution, the court gave an instruction in which the following language was used: "The mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not sufficient to justify a conviction; it is merely a guilty circumstance which, taken in connection with other testimony, is to determine the question of guilt."

The objection made by appellant to this instruction is pointed to the expression, "It is merely a guilty circumstance." It is contended that the court thereby decided for the jury a question of fact.

In other parts of said instruction the jury were told that such possession "is a circumstance tending in some degree to show guilt, but not sufficient, standing alone and unsupported by other evidence, to warrant you in finding him guilty." No objection is taken to this part of said instruction, and we see no material distinction between the expressions "a guilty circumstance" and "a circumstance tending in some degree to show guilt." It has never been supposed that the possession of property recently stolen was of itself evidence of innocence; but, on the contrary, the average juror would, if uninstructed, at once assume from such unexplained possession that the possessor was the thief, and therefore such instructions are favorable to the accused, though in whatever form they may be given there is a necessary implication that recent and unexplained possession does tend to prove guilt. This implication clearly appears in an instruction given to the jury at the request of the defendant, "that the mere possession of stolen property is not sufficient to convict a person of stealing the same. There must be other corroborating circumstances in the case, satisfying the minds of the jury beyond a reasonable doubt that the accused did some act or thing essential to the commission of the offense." If it were conceded that the use of the words "guilty circumstance" were objectionable, as used by the court, this subsequent instruction must have corrected any erroneous impression made upon the minds of the jurors.

3. Section 2061, subdivision 3, of the Code of Civil Procedure is as follows: "A witness false in one part of his testimony is to be distrusted in others." The defendant requested an instruction substantially covering this provision of the code. The court modified it by inserting the word "willfully" before the word "false," and it is contended that the court erred in doing so. It is argued that "one is not more worthy of credit who either inadvertently, negligently, or ignorantly testifies falsely than he would be if he testifies willfully so." In *People v. Sprague*, 53 Cal. 493, the defendant requested an instruction in the exact words of the statute above quoted, and the court modified it, as was done here, by inserting the word "willfully" in the same place. The court said: "The word 'false' is not the equivalent of 'mistake,' as contended for by defend-

ant's counsel; the word 'willfully' did not change the effect of the instruction as offered." (See, also, *People v. Treadwell*, 69 Cal. 238; *People v. Flynn*, 73 Cal. 515; *People v. Clark*, 84 Cal. 582, 583.)

4. The defendant requested that the following instruction be given to the jury: "The court instructs the jury that there is no evidence that the defendant participated in the actual stealing of the cow. The evidence in this case only shows that the defendant sold some property alleged to have been stolen, and upon this evidence you cannot convict the defendant alone."

The court did not err in refusing it. It would have taken the case from the jury and compelled an acquittal, and we have already held that there was evidence sufficient to sustain the verdict.

5. It is also insisted that the court should have granted defendant's motion for a new trial. This motion was based upon a statement of the case and an affidavit made by Noberto Valencia, the police officer whom the defendant testified he saw and spoke to on the street while he was leading the horse and Riverio was leading the cow.

The evidence that was heard upon the trial being sufficient to justify the verdict, as we have already seen, it only remains to consider whether the affidavit of Valencia required the court in the proper exercise of its discretion to grant the motion.

The facts stated in this affidavit corroborated the testimony of the defendant as to the fact of meeting him and speaking with him on the street, and that another man was leading the cow, and were, therefore, material. Valencia was present at the trial as a witness for the prosecution, but, as appears from his affidavit, toward evening absented himself, with the knowledge of the bailiff, who told him that if he should be wanted he would be sent for, and that he did not know that the defendant wanted him. What Valencia could have testified to was well known to defendant, and his evidence is not therefore newly discovered; but for some reason no steps were taken to secure his attendance as a witness for the defendant. When the evidence on the part of the defendant was about to be closed, his counsel said to the court: "I would like to put on Mr. Valencia, but if the court thinks I have not shown diligence, I cannot insist upon it." It

must be clear that if his lack of diligence was such that he could not ask the court for a little delay to procure his presence and testimony, the affidavit could not justify the court in granting a new trial. Besides, we do not think his testimony could have properly changed the result.

Some other exceptions were taken during the trial, but we find none requiring notice.

The judgment and order appealed from should be affirmed.

Searls, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Henshaw, J., McFarland, J., Temple, J.

[Sac. No. 256. Department Two.—January 4, 1898.]

COUNTY OF KINGS, Appellant, v. COUNTY OF TULARE,
Respondent.

SWAMP LANDS—TITLE AND CONTROL OF STATE—PROCEEDS OF SALE—COUNTY SWAMP LAND FUND—TRUST—AGENCY FOR STATE.—The swamp and overflowed lands were granted to the state by the act of Congress of September 28, 1850, and the title was thereby vested in the state, for the purpose of enabling it to reclaim the lands by means of levees and drains; and the control of the swamp lands and of the proceeds of their sale being in the state, without power in anyone but the United States to question the disposal made of the lands or their proceeds, no person and no county has any control over or interest in either lands or their proceeds except as the state has granted it. The state has not granted any swamp lands to the counties nor any funds arising from the sale of swamp lands therein, and the establishment of a swamp land fund in the various counties where swamp land districts have been formed was the creation by the state of a trust fund, making the counties and county officials mere agencies of the state, used by it in carrying out the purpose of reclamation, and the state may alter or amend its laws relating to the subject and control the custody of the fund at its pleasure.

TD.—DIVISION OF COUNTY—CUSTODY OF SWAMP LAND FUND—ACTION BY NEW COUNTY NOT MAINTAINABLE.—Upon the division of a county no provision has been made by law for any change in the custody of the swamp land fund of the original county; and it cannot be claimed in such case that the trust has failed for want of a trustee, nor is there any ground for equitable interposition, but the legislature is the appropriate and only source of relief; and no action will lie on behalf of the new county to recover a share of such fund.

APPEAL from a judgment of the Superior Court of Fresno County. Stanton L. Carter, Judge.

The facts are stated in the opinion.

M. L. Short, and H. L. Smith, for Appellant.

F. B. Howard, and T. E. Clark, for Respondent.

CHIPMAN, C.—This action was brought by plaintiff to recover \$104,581.72, the proceeds of certain swamp and overflowed and lake lands. A demurrer to the amended complaint was sustained, and, plaintiff declining to amend, judgment passed for defendant, from which this appeal was taken. Briefly summarized, the amended complaint sets forth that plaintiff county was duly organized on May 29, 1893, and embraced certain territory theretofore within the boundaries of defendant county; that before the new county was formed, certain swamp, overflowed, and lake lands, within its boundaries, were sold to sundry persons, pursuant to laws for the sale thereof within this state, and that the purchase price has been paid to the county treasurer of Tulare county, and that no part of the same has since been paid to Kings county, or to any person for its use or benefit; that upon its organization Kings county "became invested with the power to receive into its custody and corporate keeping all the swamp, overflowed, and lake lands in its limits which were not under the control and management of private ownership; and also became invested on said twenty-ninth day of May, 1893, with full power and authority to take, hold, and keep, all such sums of money as had been paid into the treasury of said Tulare county for any and all lands belonging to the state of California, as well also as to take and receive from said county of Tulare all moneys of every character and description as has ever been paid in any manner in to the said treasury of said Tulare county for any and all swamp and overflowed state lands of any and every kind, . . . except such portions of said money for said lands as can be shown by said Tulare county to have been paid out in the regular forms and manner prescribed by the laws of this state . . . to parties legally entitled to recover the same;" that the balance, after making all legal deductions, now held by said Tulare county belonging to said Kings county, amounts to the sum aforesaid;

that the claim was duly presented to and filed with the clerk of the board of supervisors of said Tulare county on May 13, 1895, and payment was refused.

The demurrer is upon the grounds: 1. That the complaint does not state facts sufficient to constitute a cause of action; and 2. That the cause of action is barred by section 41 of the County Government Act, approved March 24, 1893 (Stats. 1893, p. 363), for the reason that the claim mentioned in the complaint was not filed with the clerk of the board of supervisors of Tulare county within a year after the last item of said claim accrued, and because the whole of said claim, and each and every item thereof, accrued more than one year prior to its presentation.

As in our opinion the complaint does not state facts sufficient to constitute a cause of action, it is not necessary to consider the other grounds of demurrer.

It is contended by appellant that the swamp land fund created by the purchase price of the swamp and overflowed lands of the state has been by legislative grant donated to the counties in which the lands sold were situated, in trust for the reclamation of such lands and for the owners thereof; that the county in which the lands are situated is the trustee of this fund, and that the act creating Kings county removed the county of Tulare as trustee of the fund sued for; and as the fund can only be used for the purposes of the trust by order of the board of supervisors of the county in which the lands are situated, the price of which created the fund, Kings county can maintain this action.

Respondent contends that the money claimed by appellant belongs to the state and not to either county; and, if it ever belonged to Tulare county, no law has ever been passed transferring any portion of it to Kings county. The swamp and overflowed lands of the state were granted to it by act of Congress approved September 28, 1850, and by acts amendatory thereof. The title is in the state. The purpose of the grant was to enable the state to reclaim the lands by means of levees and drains. The act of Congress has been construed by the supreme court of the United States to be a grant to the state of full power to dispose of the lands, and to make application of the proceeds

so far as necessary to secure the object specified. No person except the United States can question the disposal made of these lands or their proceeds by the legislatures of the several states. (*American Emigrant Co. v. Adams County*, 100 U. S. 61; *Mills Co. v. Railroad Co.*, 107 U. S. 557; *Hagar v. Reclamation Dist.*, 111 U. S. 701; *United States v. Louisiana*, 127 U. S. 182.) The control of swamp lands and the proceeds of their sale being in the state, no person and no county has any control over or interest in either the lands or their proceeds except as the state has granted it.

The state, by act of April 28, 1855 (Stats. 1855, p. 189), made provision for the sale of these lands at one dollar per acre, the money to be paid to the county treasurers of the counties where the land was located, and to be transmitted to the state treasury by them.

By section 1 of the act of April 21, 1858 (Stats. 1858, p. 198), the proceeds of these lands sold under that or any former act were to be paid into the treasury of the state "as state revenues and credited to the swamp land fund, to be appropriated for the reclamation of said lands as the legislature may direct." The purchaser was required by section 4 to pay to the county treasurer one dollar per acre for the lands purchased, and take duplicate receipts and have them recorded in the office of the county auditor, who should send a copy to the state register.

Section 5 of the act required the county treasurer to pay over to the state treasurer, at the same time and manner as "other state revenues," all moneys received under the act, and send to the controller the names of all purchasers, number of survey, number of acres purchased and amount of money "to be credited to the swamp land fund." Certificates of purchase were to be issued by the state register.

The act of March 28, 1868 (Stats. 1868, p. 50), is entitled "An act to provide for the management and sale of the lands belonging to the state." This is a very elaborate statute of seventy-two sections, and is divided into three distinct parts. It is practically the basis of our present state land system, and appears to have repealed all previous acts. The scheme of reclamation of swamp and overflowed salt marsh and tide lands, substantially as it exists to-day, was there developed. Most of its

provisions relating to reclamation have found their way into the Political Code now in force. Upon the register was devolved the duty "to keep separate and distinct accounts and records in relation to each class of lands to which the state is or may be entitled."

Section 23 of the act required all certificates of location of all state lands to be presented to the county treasurer, and it was made his duty to receive the amount paid in full or in part, and the certificate was also required to be presented to the county auditor, who was required to charge the amount paid to the county treasurer.

Sections 24 and 25 required the county treasurer to report monthly to the state register all moneys received, names of purchaser, etc., and at the end of each quarter to report to the state controller the amount received from each class of lands; this report was to be sent to the register by the controller, and if reported correct by the register, the controller was to settle with the county treasurer, "provided, that the county treasurer shall retain in his own hands all moneys arising from the sale of swamp and overflowed land, and shall place the same to the credit of a fund to be known as the 'swamp land fund' of the county, and the same shall be subject to the orders of the board of supervisors, except as may be hereinafter provided."

Section 47 provided for the transfer of the fund then in the state treasury to the several counties, and the county auditor and treasurer were directed, "under direction of the board of supervisors, to place said assets on their books to the credit of the proper swamp land district fund."

By the provisions of this act, and of certain acts next to be noticed, appellant claims that the state granted "the proceeds of the sales of these lands to the county in which they are situated, to hold in trust for the reclamation of the lands under the system provided by the state, or for the owner of the land if he reclaims it by his own labor and means." One of the acts upon which appellant further relies is the act of March 28, 1874 (Stats. 1873-74, p. 770), entitled, "An act to provide for the proper distribution, in the several county treasuries, of funds existing from the sale of swamp lands." The first section directs the board of supervisors, in counties where a swamp land dis-

trict may be organized, upon the application of a party interested, to "direct the auditor and treasurer to set apart from the swamp land fund, in the county treasury, all the moneys which has been or may hereafter be received in payment of principal and interest in such lands, as a fund to the credit of such district, except such money as may have been previously expended for the benefit of land within the district." Section 2 of the act directs that the money in the district fund "shall be paid out only for the purpose of reclaiming said land, or to the owners of such land after reclamation, as now provided by law." The remaining portion of the act relates to certain deductions to be made for money expended before payment to the owner of any of this fund.

The act of March 31, 1891 (Stats. 1891, p. 243), relied upon, is entitled "An act providing for the payment of all moneys in the state treasury, to the credit of swamp land district funds, to the treasuries of the counties wherein the said swamp land districts are situated, and to provide for the control of the same by the auditor and treasurer of said counties; and prescribing the duties of the controller and treasurer in relation thereto." The title of this act explains its purpose, which was to transfer funds then in the state treasury. Presumably, when this act was passed, some of this swamp land money had found its way into the state treasury, and this act was to put it into the county treasuries. Previous law had done this, and why this act became necessary we are not advised, but it did not provide for an adjustment between counties of funds already in their treasuries, nor does it contain any words of grant or donation to the counties. The general law now governing the subject is to be found in the Political Code, title VIII, article II, chapter 1, which, with the several general laws or parts of the same as remain in force, forms the statute law on the subject.

It is clear from an examination of these various laws that the state has never parted with its title to swamp lands to the counties. The title under all laws passes directly to the purchaser from the state. The only question is as to the disposition made by the state of the proceeds of the sale. The uniform price for these lands has been one dollar per acre. The state has never undertaken to profit by the sale. The purpose of the grant to

the state—to wit, the reclamation of the lands—seems to have been the governing principle of their disposition and management.

Certain results of the grant of swamp and overflowed lands to the state, and of our legislation respecting those lands, seem clear enough, to wit, the grant was for the purpose of securing their reclamation; the state has never deviated from a consistent course of legislation to attain that purpose; the state has always retained the absolute control and ownership of the lands and has itself given the evidences of title when sold to purchasers; the state in the earlier legislation required the proceeds of sale to be paid to state officials and to be retained by them in their custody, although county officials were made use of as agencies, and, as in the sale of other state lands, to receive and transmit the moneys paid by purchasers. Later, the moneys paid by purchasers, and the moneys derived from assessments levied for reclamation purposes, were paid to the county officials and retained by them to be placed in a fund called the “swamp and overflowed land fund.” By the act which inaugurated this change it was also provided that all such moneys in the state treasury should be transferred to the several counties where swamp land districts had been formed to be placed in this same swamp land fund.

The state has ceased to be the immediate custodian of the fund, but there is nothing in any act that confers upon any county any property right in or to this fund, and there is nothing in any act from which it may be inferred that the state has relinquished its right of legislative control over it, or has renounced or transferred its trust. The scheme of reclamation provided by the legislature involved much detail and made it necessary for the owners of the land to have frequent communication with the officials controlling the fund, and hence, both as matter of convenience to the landowner and to facilitate the purpose of the grant to the state, the fund was placed in the county treasuries. In a certain but very limited legal sense, it was a trust and the fund a trust fund, but not differing from other trusts that may be said to be imposed upon counties and county officials by legislative direction relating to other matters of local government and local administration.

Under the code provisions, the county treasurer must now, as he was under all laws required to do, forward monthly reports of all moneys received for sales of all state lands; at the end of each quarter he must report to the controller "the sum which has been received from each class of land"; these reports must be examined and certified to be correct by the register, whereupon the county treasurer must make his settlement with the controller and pay over all moneys, etc., except he "must retain all moneys arising from the sale of swamp and overflowed lands and place the same to the credit of a fund known as the 'swamp land fund' of the county." (Pol. Code, secs. 3422-3426.) Examination of section 3474, and the following sections, will show that, while the reclamation is carried on immediately under supervision of the boards of supervisors, reports of the work must be made to the register, and it is through this officer credit is given to the purchaser for his payments made. The county official machinery and county officials, as agencies of the state, have been and are being used in carrying out the original purpose in the mind of Congress. (*Edwards v. Estell*, 48 Cal. 194.) There is nowhere to be found in any of the various acts relating to these lands any legislative donation of this fund or grant in trust or otherwise as claimed by appellant. The state has done no more than to call to its aid, in administering the congressional grant, the various counties where the land is situated, and the state may alter or amend any of its laws relating to the subject, and may reclaim the custody of the fund not already disposed of under the law at its pleasure. (*Kimball v. Reclamation Fund Com.*, 45 Cal. 344.) When Kings county was organized, the fund was in the custody of the proper officials of Tulare county, and the only debatable question here is: Did the act creating Kings county transfer or has any act authorized the transfer of this fund to Kings county?

Section 15 of the act creating Kings county authorized it to collect unpaid taxes assessed upon lands within its boundaries.

Section 16 authorized it to receive and Tulare county to pay over the proportion of the school fund to which it was entitled, and also its share of the road fund.

There was no provision for the transfer or payment to Kings county of any other fund or part thereof. There is no mention

made of the swamp land fund and nothing in the act to justify us in holding, as is claimed by appellant, that "the act removed Tulare county as trustees of the fund sued for."

On March 23, 1893, the day following the Kings county act, an act was passed (Stats. 1893, p. 235) entitled "An act to transfer certain moneys from one county to another, when a new county has been formed and organized." By this act a transfer was directed of all moneys standing to the credit of any road or school district, "the territory comprising which has been segregated from such old county, and which is included in the boundaries of such new county."

Section 4 of the act provided as follows: "A compliance with the provisions of this act shall be a full and complete settlement of all demands which the new county had against the old county or counties."

We have been unable to find any general law or special act, and none has been pointed out, giving express authority for transferring this fund. We do not think the authority can be derived from the general laws relating to the fund. They do not seem to have contemplated the division of counties and the possible shifting of reclamation districts in whole or in part from one county to another. It is true that the law as it now stands would seem to compel owners of swamp lands situated in Kings county to go to Tulare county to have the business of their reclamation districts settled and adjusted, while literally the law directs them to go to the officers of their own county who are impotent to aid them.

It may be that to preserve the harmony of the system this fund now in the custody of Tulare county, so far as it has been derived from lands situated within the present boundaries of Kings county, should be transferred to the latter county. To do this some adjustment of accounts between reclamation districts would be necessary because of the interlapping of present boundaries of districts so as to leave parts of the lands of a district in both counties. There is no allegation in the complaint that the lands claimed to be swamp and overflowed lands now situated in Kings county form one or more reclamation districts separate from any district existing in Tulare county. The inference to be drawn from the complaint is, that the reclamation districts now existing embrace lands in both counties. We

think the whole subject is one exclusively with the legislature, and is not one of judicial cognizance, in the absence of express legislative authority given to the courts to take jurisdiction of it.

We do not think the complaint presents the case of a trust about to fail for want of a trustee, as appellant claims; nor does there appear to be any ground for equitable interposition. The legislature is the appropriate and only source of relief. (See *Tulare County v. Kings County*, 117 Cal. 195; and cases there cited, for a discussion of the general principles governing the disposition of property upon the division of a county.)

We think that the demurrer was properly sustained, and therefore recommend that the judgment be affirmed.

Belcher, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

McFarland, J., Henshaw, J., Temple, J.

[S. F. No. 139. In Bank.—January 4, 1898.]

C. B. RODE et al., Appellants, v. JOHN D. SIEBE, Assessor, etc., Respondent.

TAXATION—ASSESSMENT OF PERSONAL PROPERTY—COLLECTION BY ASSESSOR—VALIDITY OF STATUTE—CONSTITUTIONAL LAW.—The statute requiring the assessor to collect the taxes assessed upon personal property at the time of the assessment, upon the basis of the levy of the previous year, where the taxes are not secured by lien upon real estate, with a provision for remission of any excess in the levy, is constitutional and valid, and neither conflicts with article XIII of the constitution, requiring property to be taxed in proportion to its value, to be ascertained as provided by law, nor with subdivision 10 of section 25 of article IV, which prohibits the legislature from passing local or special laws for the assessment or collection of taxes. [Van Fleet, J., and Harrison, J., dissenting.]

ID.—HARDSHIP NOT TO BE CONSIDERED.—The fact that a law may work hardship in extreme cases cannot be considered in determining its validity.

ID.—SPECIAL LEGISLATION—GENERAL LAW—CLASSIFICATION—SECURED AND UNSECURED TAXES.—The distinction between secured and unsecured taxes is intrinsic, and justifies a classification based thereupon; and a law providing for the collection of unsecured taxes up-

on personal property at a different time and in a different manner from the collection of taxes upon personal property, which are secured by lien upon real estate, is general and uniform in its operation, and is not a special law for the collection of taxes within the meaning of the constitution.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Edward A. Belcher, Judge.

The facts are stated in the opinion of the court.

Walter H. Levy, for Appellants.

Naphtaly, Friedenrich & Ackerman, W. F. Fitzgerald, Attorney General, and W. H. Anderson, Assistant Attorney General, for Respondent.

BEATTY, C. J.—The defendant is assessor of the city and county of San Francisco. The plaintiffs are residents of San Francisco, and in March, 1895, in response to defendant's demand, made a return showing that they were owners of personal property in said city and county subject to taxation for the ensuing fiscal year, but owned no real property. The defendant assessed their personal property, and on May 20, 1895, demanded payment of the tax, amounting, at the rate of the tax levy for the previous year, to seventy-one dollars and seventy-three cents, and threatened, in case of their refusal to pay, to seize and sell enough of said property to make the amount due. To restrain such threatened seizure and sale this action was begun. The superior court denied the injunction and plaintiffs appeal.

It is conceded that the proceedings of the assessor were sanctioned by the express provisions of the statute, but it is contended that a statute which authorizes the collection of taxes on personal property not secured by lien on real property, before equalization, before levy for the year and before the beginning of the fiscal year to which they belong, is unconstitutional in those particulars, and to that extent unenforceable.

The specific objection to the law is that it violates the constitutional requirement as to uniformity of all general laws, and especially of laws relating to taxation.

It will not be necessary, in order to indicate the position of appellants to cite the various sections of our revenue law to which

reference has been made in the argument. It is sufficient to say that under the constitution and laws of California the fiscal year begins on the 1st of July and ends on the 30th of June. The taxes for each fiscal year accrue on the 1st Monday in March preceding its commencement, and become a lien from that date upon the real property of the respective tax payers. Where the real property of a tax payer is sufficient to secure the payment of all his taxes upon his personal property as well as upon the realty itself he is not required to pay the tax before the end of November; prior to which time the board of supervisors first, and the state board of equalization afterward, equalize the assessments, and then establish the rates for state and county purposes, according to which the tax is to be levied. But where a tax payer has no real property, or none sufficient to secure the payment of his taxes, the assessor is required to collect them at the time of making his assessment, and in case of failure to pay to sell sufficient of the property of the delinquent to make the amount of the tax with costs. As this collection must be enforced before the meeting of either board of equalization and before the rate for the ensuing year is ascertained and the levy made, it is provided that it shall be made according to the rate levied the previous year, and as this may be, and generally is, greater or less than the subsequent levy for the current year, provision is made for refunding to the tax payer any excess in the collection, and for the payment by him of any deficiency.

It is of course undeniable that the citizen who by the provisions of this law is compelled to pay his taxes six months sooner than others are required to pay on the same kind of property is under the disadvantage of being deprived of the use of his money for a longer period than other owners of personal property, and it is easy to put extreme cases—as counsel have done—in which real hardship would result. But it would be equally easy to imagine extreme cases in which honest tax payers, whose taxes are perfectly secured by lien upon their real property, would suffer great injustice by the removal of personal property from the jurisdiction between the 1st of March, when taxes accrue, and the end of November, when secured taxes become delinquent. The validity of a law is not to be tested, however, by its application to extreme cases involving the assumption of grossly arbitrary violation of their duties by public officers. If every law were de-

clared unconstitutional which by the application of such a test could be shown capable of working injustice, we should have very few laws left.

As to the actual working of this particular law, we know that it has been in operation in this state, outside of San Francisco, for almost forty years, and that its validity has never before been drawn in question. This could scarcely have happened if its operation was oppressive or unjust.

These arguments, therefore, must be put aside, and the law considered with reference to the different clauses of the constitution which it is supposed to violate.

1. It is said to violate section 1 of article XIII, which provides that: "All property in the state not exempt under the laws of the United States shall be taxed in proportion to its value to be ascertained as provided by law."

There is nothing in the revenue law which is inconsistent with this provision, unless it is the requirement that unsecured taxes must be paid at the time of assessment, thereby causing the tax payer to lose the use of his money longer than other tax payers do. As to the right of equalization, that is not taken away by a previous collection of the tax; and if the assessment is reduced by either board of equalization, the excess over the true amount of the tax is refunded. The same is true as to the rate. If the levy for the previous year is larger than the levy for the current year the excess is refunded. In the end all tax payers are taxed uniformly upon their duly equalized assessments, and it remains only to inquire whether there is such an intrinsic difference between secured and unsecured taxes as to justify the legislature in making different regulations as to the time of their collection.

The clause of the constitution which is supposed to preclude such a difference of regulation is subdivision 10 of section 25 of article IV, which prohibits the legislature from passing local or special laws for the assessment or collection of taxes.

This law is not a local law, and it is not special if the classification which it makes is based upon intrinsic differences requiring different regulations.

That there is such intrinsic difference between secured and unsecured taxes seems to me self-evident. The object of the constitution is to make the burden of taxation equal in proportion to

the value of all taxable property. To accomplish this object, it is not only necessary that assessments should be duly made and equalized, and the rate levied uniformly, but measures must be taken to secure the collection from all alike. The law imposes upon real estate a lien dating from the first Monday in March of every year for all taxes levied upon the owner for the ensuing fiscal year. It makes such taxes perfectly secure by a lien upon immovable property, and the burden of this lien is in many instances an inconvenience and disadvantage to the owner. If the owner of personal property has no real property to secure the payment of his taxes, must the state leave him for more than six months at liberty to remove himself and his property without its jurisdiction, and risk the loss of the tax altogether, to the prejudice of those whose taxes are secured? Either it must do so or it may collect the tax at once, or take the property into its possession and thus secure the only lien to which personal property may be subjected. These considerations make it clear that there is a difference between secured and unsecured taxes which justifies the classification which the legislature has made, and leaves the law entirely free from objection on the ground that it is not general and uniform.

The other objections stated by counsel have not been pressed, and we think them wholly without merit.

Judgment affirmed.

Henshaw, J., Temple, J., Garoutte, J., and McFarland, J., concurred.

VAN FLEET J., dissenting.—I dissent. In my judgment, the provisions of the act in question clearly violate the constitutional rule that "all property shall be taxed in proportion to its value." (Const., art. XIII, sec. 1.) This provision is not satisfied by an equal assessment merely. Taxation consists in the payment of taxes, and if the operation of the statute is such as to make one person or one kind of property pay more in proportion to value than other persons or property, such a statute must be void.

Under the operation of this law, the owner of personal property not owning any real estate is forced to pay his tax many months, perhaps nearly a year, before those owning real estate are required to pay their taxes on personal property. He is, there-

fore; compelled to lose the interest on his money for that time. Obviously, the state has no more right to deprive a man of the use of his money than it has to deprive him of the money itself. The result is, that he has to pay more than others on the same valuation—the difference being measured by the value of the use of the money during the period in which the others are not required to pay.

This constitutional rule is further violated by this legislation because the "value" in proportion to which the taxation is to be laid is "to be ascertained as provided by law," and such ascertainment has not been completed when the tax is required to be paid. The provisions of the statute concerning equalization make no exception as to any kind of property, and none could constitutionally be made. (Const., art. IV, sec. 25, subds. 10, 33.) The right of any tax payer to have his assessment reduced, if too high, is therefore perfect; and until the opportunity therefor has been afforded the tax payer, the value has not been "ascertained as provided by law." In any particular case the assessment of personal property made by the assessor may be, and not infrequently is, much too high, and is reduced by the board of equalization; yet the owner, if not also owning real property, is compelled to pay a tax based on this excessive valuation. He is, therefore, taxed in excess of his proportionate amount.

It is said that the excess, if any, will be ultimately returned to the tax payer; but this is no answer. For, first, he is deprived of the use of the money which the state has thus unjustly taken from him, and loses the interest thereon. Moreover (and this is no light consideration), a person who could pay the proper amount of tax may be wholly unable to pay the excessive amount thus demanded, and is, therefore, forced either to sell his property on the spot, perhaps at a ruinous sacrifice, or to submit to a seizure and sale by the assessor at still greater loss aggravated by penalties and costs. By this process he is certainly taxed in effect at a higher rate than other persons, and the statute as to him has not a uniform operation.

the system provided by these provisions is also open to the simliar objection that the property owner is required to pay his tax before even the rate of taxation has been ascertained. He is required to pay on the basis of the levy for the preceding year; and while this may be lower than the rate which may be levied

for the current year, it may also be much higher. In the latter case the tax payer is required to pay to the state a sum in excess of his proportionate share, and he is deprived of the use of the money represented by such excess for many months, and in many cases is compelled to resort to onerous, and for a poor man expensive, proceedings to collect it.

It is contended that this legislation is based on a classification which the legislature is competent to make. But if this were so, it would not help the case. The legislature has no power by any process of classification to tax any person or any kind of property, except in proportion to the value of the property.

But the supposed classification is in itself arbitrary and invalid. Personal property might be said to constitute a class, as distinguished from real property, and the legislature might perhaps make such differences in the rules for the taxation of these different classes as should legitimately follow from the inherent difference between them. But the classification here attempted is not based upon any difference in the property itself, or even in its situation. What has been undertaken is to prescribe one rule for the taxation of personal property when owned by one person, and a different rule for the taxation of precisely similar property when owned by another person. Such a classification the legislature has no power to make. (*Pasadena v. Stimson*, 91 Cal. 238, 251; *Ex parte Frank*, 52 Cal. 608; 28 Am. Rep. 642.)

It is said that unless some such distinction be made much property will escape taxation. This, if true, would not entitle the legislature to overstep its constitutional power. But the suggestion is not necessarily true. It would be quite possible to frame a system operating equally upon all, in which no such result would necessarily follow; and, in fact, for more than thirty years such a system prevailed in San Francisco, and it was never claimed, so far as I am aware, that personal property taxes were not collected as closely there as in the other counties of the state.

It is also said that this system has been substantially in force in this state since a very early period, and that there is, therefore, a strong presumption of its constitutionality. It must be remembered, however, that during the greater portion of the time it was not in force in the city and county of San Francisco, wherein a very large proportion of all the taxes are paid. This

system presses most heavily on the poor—the class which is the least able to undertake legal contests—and by far the greater proportion of the poor are in a large city like San Francisco. In the interior counties the number of persons coming under the operation of this law is very small. Most of them are too poor to resist the law, and others have been restrained perhaps by the sentiment that it is not patriotic to refuse to pay taxes. Under such circumstances, the fact that the question has not previously been mooted can have no great force.

This whole system, it seems to me, presents an instance of the most vicious kind of discrimination known to the law—a discrimination against the poor. It would be much better if such a thing were necessary, that the state should lose some small portion of its revenue than that it should wring it by questionable means out of those least able either to endure or to resist such exactions. For this reason, if for no other, it is the duty of courts to jealously scrutinize such a discriminating system, and to unhesitatingly condemn it unless a clear constitutional warrant for its exercise be made to appear. In my judgment no such warrant can be found under the constitution of this state.

I think the judgment should be reversed.

HARRISON, J., dissenting.—I also dissent from the judgment of the majority of the court upon the following considerations, as well as for the reasons expressed in the opinion of Mr. Justice Van Fleet:

The provisions of section 3820-3824 of the Political Code are, in my opinion, totally at variance with the constitutional rights of the citizen. By these sections the assessor is authorized to assess and summarily sell the property of any person "when in his opinion" the person does not own sufficient real property within the county to secure the payment of his taxes. Under this provision, an assessor has the unrestricted power to exercise favoritism or antagonism toward the person to be assessed. It does not affect the principle whether the power is so exercised or not—the fact that it may be used as a cover to an unfair assessment is the test of the right of the legislature to confer the power. Under the principles of the constitution of this state, the sovereign power of taxation cannot be intrusted to the arbitrary will of any individual; and it is equally immaterial to the question

that the person assessed may subsequently obtain redress for any abuse of this power. The state can by this mode no more deprive the citizen of his property for six months than it can take it from him entirely. In either case his property is taken without due process of law. Under the authority thus given, one's property, which in reality is not of greater value than five hundred dollars, may be assessed at five thousand dollars, and the very property so assessed taken from the owner and summarily sold at a forced sale, where as it is well known its value is never realized, and the surplus, after deducting the taxes and costs, returned to the owner. It is poor satisfaction to him that months afterward the assessment is reduced by the board of equalization to its actual value and that still later he may recover from the county the difference between what should have been his taxes and what the assessor took at the sale of his property. I have no hesitation in holding that such a procedure is contrary to the principles of free government.

[S. F. No. 557. Department One.—January 5, 1898.]

GEORGE D. BLISS, Appellant, v. R. G. SNEATH, Respondent.

STATUTE OF LIMITATIONS—COUNTERCLAIM—PLEADING—DEMURRER—DEFENSE TO COUNTERCLAIM—RECORD UPON APPEAL—PRESUMPTION.—The statute of limitations is a personal privilege which is waived, unless specially pleaded; and, where a counterclaim appears upon the face of the answer to be barred by the statute of limitations, it must be specially pleaded to by demurrer on that ground, else it is waived; and if it does not so appear, in order that it may be availed of upon appeal as a defense to the counterclaim, and that reversible error may be shown in sustaining the counterclaim, it is incumbent upon the plaintiff to show in the record upon appeal that the statute of limitations was urged in the court below and relied upon as a defense to the counterclaim, else it will be assumed upon appeal that no such defense was made or claimed.

ID.—ACTION FOR RENT—COUNTERCLAIM FOR DIVISION FENCE—PERIOD OF LIMITATION—STATUTORY LIABILITY.—In an action for rent, a counterclaim for a division fence constructed by the defendant upon contiguous land and used by the plaintiff is upon a liability created by statute, and is not barred short of three years from the date of the inclosure of plaintiff's land whereby the division fence was utilized; and it is immaterial that it may be deemed a cause of action upon contract within the law of setoff and counterclaim.

APPEAL from a judgment of the Superior Court of the County of San Mateo. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Byron Waters, for Appellant.

Garret W. McEnerney, for Respondent.

HARRISON, J.—The plaintiff seeks by this action to recover the rent of certain lands demised by him to the defendant. The defendant makes no issue upon his liability for the amount claimed, but alleges in his answer that the plaintiff is only the agent of his wife, who is the owner of the land, and prosecutes the action in her behalf; that the demised land is contiguous to certain lands of his own; that he had constructed a division fence between the contiguous tracts, and that subsequently thereto, and prior to the commencement of the action, the plaintiff's wife had inclosed her tract and made use of said division fence, and that by virtue of section 841 of the Civil Code, she thereby became liable to him for her just proportion of the division fence. He therefore pleads the amount of this liability as a defense or counterclaim to the demand of the plaintiff. The cause was tried by the court, and findings of fact were made in accordance with these averments, fixing the amount of eight hundred and ninety-one dollars and ten cents as the just proportion of the value of the fence to be paid by her, and rendered judgment in favor of the plaintiff for the difference between the amount claimed in the complaint, and this last-named sum. The plaintiff has appealed from the judgment, and brings the appeal here upon the judgment-roll, without any bill of exceptions.

In suport of his appeal, the plaintiff contends that the court should not have allowed any portion of the counterclaim pleaded by the defendant, for the reason that it was barred by the statute of limitations. The fence was constructed by the defendant in 1877, and the plaintiff's wife inclosed her tract and made use of the division fence between May 21, 1888, and June 1, 1888. The present action was commenced May 15, 1891, and on May 18, 1891, the defendant commenced an action against the plaintiff and his wife to recover for her portion of the value

of the division fence. This latter action was pending at the time the present action was tried. No plea of the statute of limitations was made by the plaintiff to this claim, and it does not appear from the record that the plaintiff made any claim of this nature before the superior court. He, however, contends that the statute is deemed to have been pleaded by virtue of the provision of section 462 of the Code of Civil Procedure, viz: "The statement of any new matter in the answer in avoidance, or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party."

The statute of limitations is a special defense which may be either relied on or waived at the election of a party entitled to avail himself of it, and, if not specially made, will be deemed to have been waived. (*Kelley v. Ariess*, 68 Cal. 213.) Being a defense which is personal in its nature, it must be affirmatively shown to the court that it is relied upon by the party as a defense to the action; and upon an appeal from a judgment against a party entitled to make the defense, it will be assumed that the defense was waived, unless it affirmatively appears from the record that it was made in the court below: "Whenever a defense is of the nature of a special privilege, of which the party can only avail himself by pleading it, then the pleading, whether it be by demurrer or answer, must specify the grounds of his defense. A complaint which states a cause of action which might be defeated by interposing the statute of limitations may be sufficient to support a judgment, provided the defendant does not choose to avail himself of the defense afforded him; and hence if he elects to avail himself of any defense personal to himself, as a special privilege or immunity, he must manifest that election by pleading it." (*Kent v. Snyder*, 30 Cal. 672.) Even if it appears upon the face of the complaint that the claim sued upon is barred by the statute, the defense is not available unless it is pleaded. It is unavailable under a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, but must be specially stated as a ground of the demurrer. (*Brown v. Martin*, 25 Cal. 82.) Not only must the facts set forth in the complaint show that the defense is available, but, as the court is not authorized to consider the defense unless it is claimed, the election to claim it is a fact which must also appear upon the record before the court can

hold that it exists. Section 443 of the Code of Civil Procedure authorizes a plaintiff to demur to a counterclaim set up in the answer, upon the ground (sec. 444) that the answer does not state facts sufficient to constitute a counterclaim. But, if he would rely upon the statute of limitations, he must specify this as the ground of his demurrer as fully as in a demurrer to a complaint upon this ground. A judgment in favor of a counterclaim which appears on its face to be barred by the statute will be affirmed if the statute is not invoked as a defense, upon the same principles that a judgment upon a similar complaint will be affirmed in the absence of pleading the statute.

When a judgment of the trial court is brought here for review, it is incumbent upon the appellant affirmatively to show some reversible error committed by that court. If the appeal is presented upon the judgment-roll, the error must appear on the face of the record. Not only will error never be presumed, but every presumption will be indulged in favor of upholding the judgment. Although findings are required upon all material issues, a judgment will not be reversed for want of a finding, unless it shall appear that there was evidence before the court from which it was required to make a finding which would countervail its other findings. (*Winslow v. Gohransen*, 88 Cal. 450.) In the absence of any showing of this kind, it will be assumed that there was no evidence upon such issue. This rule applies not only to the issues that are made to the allegations of the complaint by the answer, but also to the issues made by the averment of new matter in the answer, which are "deemed controverted" by virtue of section 462 of the Code of Civil Procedure. A failure to make a finding upon any of these issues will not, in the absence of a bill of exceptions, be held to be error, and a failure to make a finding upon the issue of the statute of limitations, when it does not appear that the defense was claimed in the court below, will not be held to be error. It will be assumed here that such defense was not made in the court below, under the same principles as it is assumed that no evidence was offered upon any other issue on which no finding is made. As this defense to the counterclaim does not appear upon the record, we must assume that it was not made in the court below.

Upon a former appeal herein (*Bliss v. Sneath*, 103 Cal. 43)

the judgment was reversed upon the ground that the answer presented a defense to the complaint which should have been considered by the court, and that upon plaintiff's motion for judgment on the pleadings the amount claimed in the answer should have been allowed in reduction of his claim. If, however, as is claimed by the plaintiff, the claim set up in the defendant's answer would be barred by limitation at the expiration of two years, and the statute of limitations is deemed to have been pleaded on behalf of the plaintiff by virtue of section 462 of the Code of Civil Procedure, that would have been a sufficient reason for affirming the judgment, instead of reversing it.

Under these considerations it is unnecessary to determine whether the counterclaim pleaded by the defendant would be barred in two years or three years.

The judgment is affirmed.

Van Fleet, J., concurred.

BEATTY, C. J., concurring.—I concur in the judgment, upon the ground that the counterclaim was upon a liability created by law and was not barred short of three years. The decision upon a former appeal, that is was a cause of action arising out of contract within the law of setoff and counterclaim, is not at all inconsistent with this view. A liability may be at the same time a statutory and contract liability—and so it has been held by this court with respect to the liability of stockholders. It is a statutory liability as to the statute of limitations (*Moore v. Boyd*, 74 Cal. 167), and a contract liability as to the right of attachment (*Kennedy v. California Sav. Bank*, 97 Cal. 93; 33 Am. St. Rep. 163), and as to the law defining the jurisdiction of justices of the peace. (*Dennis v. Superior Court*, 91 Cal. 548.)

[S. F. No. 608. Department One.—January 5, 1898.]

**CAROLINE HAWXHURST, Appellant, v. J. RATHGEB, Sr.,
Respondent.**

POWER OF ATTORNEY—SALE AND TRANSFER OF NOTES AND MORTGAGES
—No POWER OF HYPOTHECATION CONFERRED.—A power of attorney authorizing the attorney in fact, to sell, transfer and release certain mortgages therein specified, and to indorse and transfer the notes thereby secured, and to sell and transfer the claims of the principal for said notes and mortgages against the estate of the deceased mortgagor, and to receive payment of said claims and give acquittances therefor, confers only a power to sell and transfer the title to the securities absolutely, or, if not so sold, to collect them from the estate of the deceased mortgagor, and no power is conferred thereby to hypothecate the mortgages as security for borrowed money, and such hypothecation, being in excess of authority is void, and vests no right in the person to whom the hypothecation is made.

ID.—ACTION BY HOLDER OF SECURITIES—DETERMINATION OF ADVERSE CLAIM—FINDINGS AGAINST EXECUTION OF POWER—SPECIAL ORDER REFUSING NEW TRIAL—CONSTRUCTION OF POWER—EFFECT UPON FINDINGS.—In an action brought by the holder of a hypothecated note and mortgage which had been transferred to plaintiff as security for money borrowed by one claiming to act as attorney in fact for the mortgagee, to determine an adverse claim made thereto by the mortgagee, where the court found that the power of attorney had not been executed by the mortgagee, and that there was no authority for the hypothecation, and rendered judgment for the defendant, and plaintiff moved for a new trial on the alleged ground of insufficiency of the evidence to sustain the findings, and the court denied the motion solely upon the ground that the power of attorney, assuming it to be genuine, conferred no power to assign the note and mortgage as security for the individual debt of the attorney in fact, and stated that "otherwise, a new trial would have been granted," *held*, that the recitals in the order did not operate to change the findings as theretofore existing, and that they remained as originally made, and could only be set aside by the granting of a new trial.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The action was brought to determine an adverse claim of the defendant as mortgagee to a note and mortgage hypothecated to plaintiff by C. E. K. Royce, assuming to act as the attorney in fact of the defendant. Further facts are stated in the opinion of the court.

E. J. & J. H. Moore, for Appellant.

R. Thompson, for Respondent.

VAN FLEET, J.—Appeal from judgment and order denying a new trial. The action involves the rights of the parties in two certain notes and mortgages executed by one Kunz to defendant, which plaintiff claims to own by virtue of an assignment and delivery thereof to her, made in defendant's name by one C. E. K. Royce, claiming to act as attorney in fact for defendant under an alleged power of attorney from defendant to said Royce.

The trial court found that defendant never executed the power of attorney to Royce, and that the latter had no authority to make the assignment of the securities, and gave judgment in favor of defendant.

Plaintiff moved for a new trial, on the ground, among others, of insufficiency of the evidence to warrant the findings. In passing upon this motion, the court made an order, the material part of which was as follows: "It is ordered that said plaintiff's motion for a new trial of this action be and the same is hereby denied. This order is made solely upon the ground that, even assuming that the letter of attorney from defendant to Royce was executed by defendant, it conferred upon Royce no power to assign the note and mortgage therein mentioned to secure his individual debt. Otherwise a new trial would have been granted."

Plaintiff contends that the effect of the language used by the court below, in its order denying a new trial, was to change and reverse its finding that defendant did not execute the power of attorney to Royce, and to substitute therefor a finding in favor of the due execution and authenticity of that instrument; and, as plaintiff further contends that the court misinterpreted the legal effect of the power of attorney in holding that it did not authorize Royce to assign the securities in question to secure his individual debt, her proposition is in substance that the judgment is left without support in the finding, and must be reversed.

But whatever the effect of the recitals in the order relied on by appellant, they did not operate to change the findings in

the case as theretofore existing. After findings have been filed, and judgment entered thereon, there is but one method by which those findings can be competently changed or modified—except perhaps in respect of a mere clerical error or misprision—and that is the mode pointed out by the statute, by the granting of a new trial. Until the findings are thus set aside, they must, under our present system, stand in their integrity as originally made. (*Pico v. Sepulveda*, 66 Cal. 336; *Thompson v. White*, 63 Cal. 505; Hayne on New Trial and Appeal, sec. 247, and cases cited.)

However, we deem it unnecessary to inquire further what the precise effect of those recitals of the order would have been upon plaintiff's rights had the court below been, as contended by appellant, in error as to the legal effect of the alleged power, since we are satisfied that not only was the learned judge clearly right in holding that the instrument gave Royce no power to assign the securities for his own debt, but further that it conferred no authority to assign them in pledge or mortgage for any purpose. Plaintiff says that the court has not found that Royce assigned the property as security for his own debt. We think the finding will bear no other construction. But, if this were otherwise, the facts as to the transaction are found, and very clearly show that the notes and mortgages were pledged as security for a loan of money. This transaction was not within the terms of the power conferred. The language of the power was "to sell, transfer, and release two certain mortgages executed by Gotthard Kunz" (describing them); "to indorse and transfer the notes secured by said mortgages; to sell and transfer my claims for said notes and mortgages filed in the superior court of said San Luis Obispo county, state of California, in the matter of the estate of said Gotthard Kunz, now deceased, and to receive payment of said claims, and give acquittances therefor." The effect of this language was to confer a power to sell and transfer the title to the securities absolutely, or, if not so sold, to collect them from the estate of Kunz. There is nothing in the language which by any proper construction purports to confer a power to pledge or hypothecate the securities for any purpose, or to borrow money thereon. The words "sell and transfer," as there used, are of no broader signification than the

words "sell and convey" used with reference to a conveyance of real estate, and the latter employed as the operative words in a power to convey land do not carry authority to mortgage or otherwise dispose of the property. (*Bloomer v. Waldron*, 3 Hill, 361, 366, 367; *Golinsky v. Allison*, 114 Cal. 458; *Dupont v. Wertheman*, 10 Cal. 354.) Whether, therefore, the power of attorney be genuine or not can make no difference to plaintiff. The act of Royce, being in excess of the authority conferred, was void, and vested no right in plaintiff. (*Frink v. Roe*, 70 Cal. 313, and cases above cited.)

We find no want in the evidence to support the findings, and the judgment and order must be affirmed.

It is so ordered.

Harrison, J., concurred.

BEATTY, C. J., concurring.—Considering the terms of the order denying a new trial, I should feel bound to hold it erroneous if I thought that the power of attorney from Rathgeb to Royce—assuming it to be genuine—conferred any authority to hypothecate the mortgages as security for borrowed money.

But I am satisfied that the power of attorney, though genuine, conferred no such authority, and upon that ground I concur in the judgment of affirmance.

Hearing in Bank denied.

[S. F. No. 513. Department One.—January 5, 1898.]

HOME FOR THE CARE OF THE INEBRIATE, Appellant,
v. CITY AND COUNTY OF SAN FRANCISCO, Re-
spondent.

HOME FOR INEBRIATES—DEDICATION OF LOT TO PUBLIC USE—PRIVATE CORPORATION—TITLE OF CITY AND COUNTY.—The dedication of a lot in the city and county of San Francisco for a "Home for Inebriates," by virtue of proceedings had under Order 800, reserved the lot from private occupation, and dedicated it to a public use, and a private corporation known as the "Home for the Care of the Inebriate," without any of the elements of a public agency, can have no right to the lot, or to its possession under such proceedings, but the title remained in the city and county for the public use designated.

ID.—CONSTRUCTION OF ACT OF 1870—ACTION TO QUIET TITLE OF PRIVATE CORPORATION—JUDGMENT FOR CITY AND COUNTY—PRESUMPTIONS UPON APPEAL.—In an action to quiet the title of such private cor-

poration against the city and county of San Francisco to such lot where plaintiff claimed title under the act of April 1, 1870, purporting to vest the title of the city and county in such corporation to a lot described therein merely as "set apart by the board of supervisors of San Francisco, or a committee of said board, to and for a corporation known as the 'Home for the Care of the Inebriate,'" upon appeal from a judgment quieting the title of the city and county, where there is no evidence or finding in the record to show that any lot was ever set apart to such corporation, or that the lot dedicated by the city to public use was ever intended for such corporation, it must be presumed that the "Home for Inebriates" described in Order 800 was not a corporation, and was not the same organization as the private corporation, "Home for the Care of the Inebriate," and that, inasmuch as the board of supervisors could set apart the land only for public uses, it did not set apart the lot in question for the private use of the plaintiff, and it must be presumed further that there was no evidence from which any finding could be made that plaintiff was the beneficiary intended by the board of supervisors.

ID.—STATUTE OF LIMITATIONS—ADVERSE POSSESSION—PRESCRIPTION—PUBLIC USE.—No title could be acquired by the plaintiff by adverse possession under the statute of limitations, or by prescription to a lot dedicated to public use.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Sawyer & Burnett, for Appellant.

Harry T. Cresswell, and James L. Gallagher, for Respondent.

HARRISON, J.—The plaintiff claims to be the owner of a lot of land within the boundaries of the city and county of San Francisco, and brought this action against the defendant to quiet its title thereto. The defendant denied the plaintiffs' right to the land, and alleged itself to be the owner of the land, and asked a judgment quieting its title thereto as against the plaintiff. Judgment was rendered in favor of the defendant, and the plaintiff has appealed.

The land in question is within that portion of the corporate limits of San Francisco which is embraced within the terms of the act of Congress of March 8, 1866. (14 U. S. Stats., p. 4.) By that act Congress granted to the city its interest in the lands therein described, and confirmed the city's claim thereto, upon

the trust that the portion thereof not previously granted to the city, and which includes the land in question, should be conveyed by the city to parties in *bona fide*, actual possession thereof at the date of the act as might be prescribed by the legislature of the state of California, "except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses." After the passage of this act, the board of supervisors of San Francisco adopted an ordinance for the purpose of carrying its provisions into effect, commonly called "Order No. 800," and this ordinance was ratified and confirmed by the legislature March 27, 1868. (Stats. 1867-68, p. 379.) By this ordinance it was provided that the board of supervisors should adopt a plan for the subdivision of the land into blocks and lots, and should select and set apart for public uses such lots and portions of said land as it might deem necessary, and should cause a map to be prepared according to this plan, upon which "shall be designated the lots and portions of land set apart for public uses, and the particular use for which each lot or portion of land shall have been set apart," and that upon the adoption of said map the portions of land designated thereon for any public purpose "shall be deemed absolutely dedicated as such." A map was thereupon prepared and adopted by the board of supervisors, upon which the lot of land described in the complaint herein was designated as having been set apart for "Home of Inebriates," and on December 7, 1868, the committee on outside lands reported to the board of supervisors that this lot was reserved for the "Home of Inebriates," and on the same day the board of supervisors confirmed and adopted this report. By these proceedings the lot of land described in the complaint was reserved by the city and dedicated to public use. As the plaintiff is a private corporation, without any of the elements of a public agency, these proceedings did not, under the principles declared in *California Academy of Sciences v. San Francisco*, 107 Cal. 334, confer upon it any right in the land, or to its possession.

The plaintiff, however, disclaims any right by virtue of the proceedings under order No. 800, but contends that the title to the lot was vested in it by virtue of section 7 of an act of the legislature, approved April 1, 1870. (Stats. 1869-70, p. 586.) This section is as follows: "The title to the lot set apart by the

board of supervisors of San Francisco, or a committee of said board, to and for the corporation known as the 'Home for the Care of the Inebriate,' is hereby confirmed to said corporation; and the title of said city and county in and to said lot is vested in said corporation forever." The lot described in the complaint herein is not, however, described in the act of 1870, nor does it appear from the record herein that any lot was ever set apart to the plaintiff by the board of supervisors, and it is only by inference that it can be claimed that the lot and land set apart for "Home of Inebriates" was ever intended for the plaintiff. The superior court has found that the lot of land described in the complaint is the same which was reserved for the use of "Home of Inebriates," but it was not found that any lot was set apart for the plaintiff, or that the plaintiff was the beneficiary for which such reservation was intended. It cannot be assumed that the lot of land set apart for the use of "Home of Inebriates" was intended for the plaintiff, or that "Home of Inebriates" is a corporation, or is the same organization as "Home for the Care of the Inebriate." If any presumption is to be indulged, it would be to the contrary, for aside from the want of identity in the names, inasmuch as the board of supervisors could set apart the land for only public uses, there can be no presumption that it set apart the lot in question for the private use of the plaintiff. Upon an appeal from a judgment, error must be affirmatively shown in order to justify its reversal. Otherwise all presumptions necessary therefor will be invoked in support of the judgment. As it was necessary for the plaintiff to show that it was the beneficiary intended by the board of supervisors for the lot in question, the failure of the court to make such finding authorizes the presumption that there was no evidence before it from which such finding could be made. It is unnecessary, therefore, to determine whether the legislature had the power to vest in the plaintiff the title to the lot in question.

The plaintiff acquired no title to the land by virtue of the statute of limitations. The court has made no finding of fact in support of this claim, and it does not appear that the plaintiff offered any evidence authorizing such finding. The finding that the plaintiff has had possession of the lot since the passage of the aforesaid act of 1870 is of no avail, in view of the other

findings to the effect that the lot had been dedicated to public use. The lot was thereby withdrawn from commerce, and title thereto could not be acquired by prescription. (*Board of Education v. Martin*, 92 Cal. 209.)

The judgment is affirmed.

Van Fleet, J., and Beatty, C. J., concurred.

[S. F. No. 749. In Bank. —January 6, 1898.]

WILLIAM F. THOMPSON, Petitioner, v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent.

INSOLVENCY—SALE BY ASSIGNEE—MOTION TO VACATE—GROUNDS OF EQUITABLE RELIEF.—Where an assignee in insolvency has made a sale by order of the court, which may be set aside upon equitable grounds, the assignee need not resort to a bill in equity, but may preferably move the court which made the order to set it aside upon any ground of equitable cognizance, and the court will particularly entertain such application, where deception was practiced or a mistake induced by the act of the purchaser, due regard being had to the intervening rights of third persons.

ID.—SALE OF WATER PIPE—FRAUD OF PURCHASER—CONDITIONAL ORDER VACATING SALE—REIMBURSEMENT OF PURCHASER—JURISDICTION.—The superior court has jurisdiction to make a conditional order vacating a sale of waterpipe, made to a purchaser for much less than its value, by reason of his fraudulent representations as to the quantity of the pipe, which was unknown to the assignee, and such order may be conditioned upon the payment to the purchaser by the assignee of a sum sufficient to reimburse the purchaser for his outlay.

ID.—EXTINCTION OF OBLIGATION OF ASSIGNEE—COMPLIANCE WITH CODE —PAYMENT INTO COURT—DUTY OF PURCHASER—CONTEMPT.—The assignee may extinguish the obligation to pay money to the purchaser, imposed by the conditional order vacating the sale, by compliance with section 1500 of the code, and, if no tender or offer of payment could be made to the purchaser through his fault, he may make showing thereof to the court, and pay the money into court for the purchaser, and it would then be the duty of the purchaser to deliver the pipe to the assignee, and, upon refusal to do so, he would be in contempt, and might be committed until he should deliver it.

ID.—EX PARTE MODIFICATION OF ORDER—NOTICE OF HEARING ESSENTIAL —WANT OF JURISDICTION—CERTIORARI.—The court had no jurisdiction, on an *ex parte* application of the assignee, to modify the conditional order setting aside the sale, so as to make the order abso-

lute, and direct the delivery of the property, without payment of the money required by the conditional order to be paid to the purchaser, and such *ex parte* modification must be annulled upon *certiorari*.

Id.—PRIOR HEARING—DISMISSAL OF CONTEMPT PROCEEDING—REFERENCE TO AFFIDAVITS USED.—Where contempt proceedings against the purchaser, to which he was a party upon a prior hearing, were dismissed, the affidavits used thereupon have performed their function, and no subsequent *ex parte* application for a modification of the conditional order vacating the sale could be aided by reference to such affidavits.

CERTIORARI from the Supreme Court to review orders of the Superior Court of the City and County of San Francisco. Charles W. Slack, Judge.

The facts in reference to the orders reviewed are stated in the opinion of the court. A petition in intervention was filed in the Supreme Court by the Clarke's Water Works, claiming that the pipe in controversy was the property of that corporation.

George D. Collins, for Petitioner.

Alfred Clarke, for Clarke's Water Works, Intervenor.

Olney & Olney, for Respondent.

HENSHAW, J.—This is a hearing upon original application for a writ of *certiorari*. The uncontradicted facts disclosed by the record are the following: The assignee of the estate of Alfred Clarke, an insolvent debtor, applied to the superior court sitting in the insolvency proceeding for permission to sell certain personal property of the estate of the insolvent. The property was second-hand waterpipe laid in the ground. An order of the court was obtained permitting the assignee to sell the pipe at private sale. He made two sales, and reported them to the court, stating that "he had sold six hundred feet of said pipe to William Long for the sum of sixty-four dollars, or at the rate of four cents per foot, and on the tenth day of June, 1896, had sold the remainder of said pipe to William F. Thompson for the sum of one hundred and twenty dollars." The sale was confirmed upon June 18, 1896. Thereafter the assignee resigned, and George P. Thurston was appointed in his stead. Thurston ever since has been and now is the duly qualified and acting assignee. Upon September 25,

1896, affidavits were presented to the court in insolvency in support of the assignee's application to have the sale of the water-pipe made to William F. Thompson vacated and set aside. One of these affidavits was that of Shepard, the former assignee. The basis of the application for the order, as appeared by the affidavits, was that the sale was made by the assignee and confirmed by the court under a mistake in fact as to the quantity and character of the pipe sold to Thompson, which mistake was induced by the fraudulent representations of Thompson to Shepard. It was shown that the assignee experienced great difficulty in ascertaining the kind and character and amount of the pipe: 1. By reason of the fact that it was covered over in the ground; and 2. Because the insolvent refused to answer any questions, or to give any information relative thereto; that the assignee under the fraudulent misrepresentations of Thompson was induced to believe and did believe that the quantity of pipe did not at the most exceed three thousand or four thousand feet, and that it was four-inch pipe of the value of four cents a foot, when in truth there were from ten thousand to fifteen thousand feet of the pipe, and some of it was six-inch pipe of greater value than four cents a foot. By reason of the fraudulent representations so made to him he made the sale of the pipe to Thompson, and reported it to the court, and the court in turn, being deceived by the representations of the assignee, became the victim of a mistake and deception thus intentionally put upon it by the purchaser, Thompson, and unintentionally by the assignee.

An order to show cause why the sale should not be vacated and set aside was served upon Thompson, and evidence taken upon the hearing. From this it appeared that the purchaser, Thompson, had been at some expense in removing portions of the pipe from the earth. The court, after hearing, made its order, finding that the sale was consummated by the then acting assignee of the estate and confirmed by the court, under a mistake of fact as to the amount of pipe included in the sale, which mistake was induced by the fraudulent misrepresentations of the purchaser, Thompson; that the sum of five hundred and twenty-five dollars was sufficient to recompense Thompson for his expenditures incurred in and about the sale, and to place him in the same position as he was in before the sale was made

It therefore ordered that the assignee pay to Thompson the sum of five hundred and twenty-five dollars within ten days from the date of the order, and that upon the payment the sale be vacated and set aside, and that, if the sum of five hundred and twenty-five dollars was not within said period of ten days paid to said Thompson, then the order of sale and confirmation should stand as the order of court. This order was made upon November 6, 1896; thereafter, and on the sixteenth day of November, 1896, other affidavits were presented to the court as the basis for an order directed to said Thompson to show cause why he should not be punished for contempt in refusing to deliver the pipe to the assignee. Herein it was shown that Thompson and his attorney were present in court at the hearing of the application to vacate the sale, and were present at the time of the making of the order last set forth. Thereafter, and within the ten days contemplated by that order, the assignee tendered to the attorney of Thompson the sum of five hundred and twenty-five dollars in gold coin. No objection by the attorney was made to the form or sufficiency of the tender; but the attorney refused to accept the money, stating that his client, Thompson, would not take it. After this tender to the attorney, numerous efforts were made to tender the money to Thompson personally, but the assignee was not able so to do, owing to the fact, as he alleges, that Thompson willfully and intentionally concealed himself in order to avoid a personal tender to him. Upon this showing the court, upon November 16, 1896, made the following order:

"It is hereby ordered that on the eighteenth day of November, 1896, at the hour of 10 A. M., William F. Thompson appear before this court in Department Ten, to show cause, if any he have, why he should not be punished for contempt of this court in refusing to deliver to George P. Thurston, the assignee of the estate of Alfred Clarke, an insolvent debtor, the waterpipe, fittings, pumps, and other ironwork now held and claimed by said William F. Thompson by virtue of a sale made by said estate to said William F. Thompson on or about the eighteenth day of June, 1896, and set aside and vacated by this court the sixth day of November, 1896."

This matter coming on for hearing, it was urged in behalf of Thompson that he could not be adjudged guilty of a contempt, for that the order of November 6th did not direct him

to restore the personal property to the possession of the assignee. This view was accepted by the judge as correct; and the order to show cause was dismissed.

Thereafter, upon November 19, 1896, the assignee presented and filed his affidavit stating that he was entitled to the possession of the waterpipe; that William F. Thompson claimed it under a sale by the assignee of the insolvent's estate made on or about the eighteenth day of June, 1896, which said sale was vacated and set aside by the order above mentioned of November 6, 1896; that Thompson still has possession of the pipe, to the possession of which affiant is entitled. Upon the filing of this affidavit, without notice to Thompson, the court upon the same day made its order, absolute in form, requiring Thompson to deliver up to the assignee all property of the estate which he claimed under the sale made by the former assignee.

Following the issuance of this order a writ of review was sued for in this court and obtained.

The first attack is directed to the order of November 6th, by which the sale to Thompson is vacated conditionally upon the payment to him by the assignee of the sum of five hundred and twenty-five dollars. It is contended that this order is void for want of jurisdiction; that the title to the property having vested in the petitioner by the sale, he could not be divested of that title in such a proceeding. The rule, however, is quite otherwise. While the party seeking relief may resort to his bill in equity, he may—and, indeed, it is often the preferable practice—apply by motion to the court which has decreed the sale, and in applying to such court he may base his application upon any equitable principle of relief which would give jurisdiction to a court of equity in any other case of sale—fraud, mistake, accident, or other ground of purely equitable cognizance. And particularly will the court entertain such applications where the deception has been practiced or the mistake induced by the act of the purchaser. In all such cases due regard will be had to the intervening rights of third persons, but no such rights have here arisen. Amongst numerous authorities supporting this proposition may be instanced *Koontz v. Northern Bank*, 16 Wall. 196; *Hackley v. Draper*, 60 N. Y. 88; *Requa v. Rea*, 2 Paige, 339; *Strong v. Catton*, 1 Wis. 471; *Anderson v. Foulke*, 2 Harr. & G. 346; *Gordon v. Saunders*, 2 McCord Eq. 151;

Brown v. Gilmor, 8 Md. 322; *Collier v. Whipple*, 13 Wend. 224; *White v. Wilson*, 14 Ves. Jr. 151; *Houston v. Aycock*, 5 Sneed, 406; 73 Am. Dec. 131; Rorer on Judicial Sales, secs. 556, et seq.

It is next insisted that the order of November 19, 1896, by which the petitioner is directed to deliver up to the assignee all property of the estate claimed by him under the sale, is void, and this contention, we think, must be sustained. A purchaser at a sale under a decree of a court of chancery, or under the order of a probate or insolvency court, submits himself to the jurisdiction of the particular tribunal, as to all matters connected with such sale or relating to him in his character of purchaser. (*Requa v. Rea, supra.*) Therefore it is that, upon motion before the court decreeing the sale, it may be set aside upon any ground of equitable cognizance. But no man may be divested of his property, or of his right to property, without process of law. As a jurisdictional prerequisite he is entitled to his notice and his hearing, and only after such notice and hearing may the action of the court be upheld. The order of November 6th was in all respects a proper order. The purchaser was served with notice and was granted a hearing. After such notice and hearing the court made its order vacating the sale upon condition, namely, that within a specified time the purchaser should be restored to his former position by the payment to him of the sum of five hundred and twenty-five dollars. The order of November 16th, based upon the affidavits of the assignee that he was unable to make the tender contemplated, was likewise a proper order. By its terms it prescribed a notice to be given to the petitioner, and an opportunity was accorded him to be heard and show cause why he should not deliver up the property. This proceeding ended favorably to the petitioner, the court agreeing with his contention that there was nothing in its preceding order requiring him to deliver the property. The rule was discharged, and the petitioner stood purged of contempt. Thereafter, upon the *ex parte* application of the assignee, based upon an affidavit essentially inaccurate in its statement of facts, the court, without notice served or hearing granted to the purchaser, made its order absolute requiring him to deliver up to the assignee all property claimed by Thompson under a sale, "which sale [so runs the order] was vacated and set aside by this court on the

sixth day of November, 1896." Herein is found the same inaccuracy referred to in the affidavit. The sale had not been vacated and set aside by the order of November 6th. At the most it was to be vacated after condition performed by the assignee. The order of November 6th, while not a judgment, yet possessed many of the essentials and characteristics of a judgment. The later order of November 19th contains a drastic modification of the order of November 6th, in that it requires the purchaser absolutely and without condition to restore the property. Before such modification so vital to his rights could be made he was entitled to be heard.

Nor can the order under consideration be supported by reference to or employment of the affidavits used in support of the hearing had upon November 18th, and this for many reasons: First, those affidavits were offered in support of an application that the purchaser be punished for contempt. He was notified of the proceeding, given an opportunity to be heard, and after hearing the proceeding against him was discharged. The affidavits then had performed their office. Again, if, as the assignee contended, the purchaser was evading a tender, a compliance with section 1500 of the Civil Code would have extinguished the assignee's obligation to pay, which otherwise remained in full force. And, finally, if it were permissible to use the affidavits in support of the order of November 19th, the fact still remains that the order was made in the absence of and without notice to the purchaser, and therefore with no opportunity afforded him to make his defense to a determination which deprived him absolutely and without condition of the possession of his property.

The order of November 6th did not require the modification attempted to be made by the order of November 19th. The assignee could have extinguished his obligation to pay by a compliance with section 1500 of the Civil Code, or could have made his showing before the court that he was unable to tender the money to the purchaser through fault of the latter, and then have paid the money into court for the benefit of the purchaser. The condition imposed upon him by the order of November 6th thus being performed, if the purchaser had thereafter refused to deliver the pipe, he would have been in contempt of the very terms of the order of November 6th, and, upon cause shown and after

hearing, the court could with propriety have committed him in contempt until he had delivered the pipe. And all this without any modification of the order of November 6th. The court, however, seems to have labored under the misapprehension that a modification of the order of November 6th was necessary, and the order of November 19th was designed as such modification. In effect the order of the 19th is a redetermination of the question, and is equivalent to a judgment that the purchaser turn over the property without repayment to him of his outlay. Such a redetermination—since these proceedings are in the nature of and take the place of a hearing in equity—could only be had after notice and a hearing to the purchaser.

The order of November 19, 1896, is therefore vacated and annulled.

The application of the assignee made herein that petitioner be required to give a bond is denied.

McFarland, J., Temple, J., Garoutte, J., Van Fleet, J., Harrison, J., and Beatty, C. J., concurred.

[No. 15633. Department One.—January 7, 1898.]

J. W. SAYWARD, Administrator, etc., Appellant, v. J. F. HOUGHTON et al., Respondents.

STOCK OF CORPORATION—ENFORCEMENT OF TRUST BY ADMINISTRATOR OF BENEFICIARY.—Where shares of the stock of a corporation had been pledged by the original owner as security for payment of his note, and had been sold to satisfy the note, and the purchaser was willing and desirous to allow the original owner the benefit of a great rise in the value of the stock, upon payment of a specified sum therefor, and such sum was advanced by the defendant under an agreement that the original owner of the stock should procure it to be transferred to the defendant to be held by him for the benefit of the original owner, upon the trust and condition that such original owner, upon the tender by him to the defendant within six months of the sum so advanced with interest from the date of advance, and a specified bonus, should receive from the defendant a transfer of all of said stock, and such original owner died before the expiration of the time limited, an action will lie in favor of his administrator, after tender to the defendant of the amount so agreed upon, to enforce the trust, and to compel a re-transfer of the stock by the defendant pursuant to the agreement.

CXIX. CAL.—35

ID.—SPECIFIC PERFORMANCE OF CONTRACT—OPTION — MUTUALITY—EFFECT OF TENDER. — Assuming that the element of mutuality was wanting in the contract sought to be enforced at the time the contract was entered into, and that it only conferred upon the original owner of the stock an option to pay the money, that element was supplied upon the offer of performance and tender of the amount agreed upon by his administrator, at which time the remedy became mutual. An original lack of mutuality in the right to specific performance of a contract will not preclude the enforcement of the contract where this want has been removed at the time the action was brought.

ID.—CREATION OF TRUST—CONSIDERATION—STATUTE OF FRAUDS.—The transaction between the defendant and the original owner of the stock was not in effect a purchase of the stock by the defendant from the prior purchaser with a mere promise without consideration to hold it for the benefit of the original owner; but in legal effect it amounted to a purchase of the stock by the original owner with money advanced by the defendant, the title to the stock being taken in the name of the latter as security for the repayment of the money so advanced, with the stipulated compensation for its use, and there was no want of consideration for the promise to return or transfer the stock, nor was there anything in the nature of the contract rendering it obnoxious to the statute of frauds; but a trust arose upon the facts in favor of plaintiff's intestate to have the stock restored to him upon compliance with the terms of the contract.

ID.—RIGHT OF ADMINISTRATOR TO SUE—OFFER OF PAYMENT.—The administrator of the deceased beneficiary of the trust may maintain an action to enforce the trust, upon compliance with the contract creating it on his part, and an offer or tender of payment by such administrator to the defendant of the sum agreed upon, within the time limited by the contract, is sufficient to authorize the maintenance of such action.

ID.—CONSTRUCTION OF CODE—MODE OF TENDER.—Section 1500 of the Civil Code does not prescribe the mode of tender, but a method of extinguishing an obligation when that object is sought.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

R. E. Houghton, for Appellant

Fox & Kellogg, for Respondents.

VAN FLEET, J.—The court below sustained a demurrer interposed by defendant Houghton to the complaint, and entered judgment dismissing the action, from which plaintiff appeals. The only question involved in the appeal is whether the complaint states a cause of action.

The averments of the complaint, so far as material here, are in substance that W. T. Sayward, plaintiff's intestate, being the owner of three thousand shares of the capital stock of the corporation defendant, the Riverside Land and Irrigation Company, transferred the same to one Felton, as security for the payment of a certain promissory note, with power of sale in Felton on default of the payment of the note; that the note not being paid, the stock was thereafter, on March 16, 1887, duly sold by Felton to one George Loomis for forty-six thousand dollars, to satisfy the note; that subsequent to said pledge, and prior to the sale, said stock had greatly increased in value, and at the date of the sale, and thereafter, and at the time of bringing this action, was of far greater value than the amount for which it was sold, to wit, of the value of one hundred and seventy-four thousand dollars; that neither Felton nor Loomis, by reason of their long acquaintance and friendship for said Sayward, were desirous of availing themselves of the benefit of the excess in value of said stock above the amount necessary to satisfy said indebtedness, but were each desirous that said Sayward should have the benefit of such increased value, and were ready and willing to give him the preference over all other persons in the purchase or redemption of said stock, and were willing that he should have said stock upon the payment of the sum of fifty thousand dollars therefor.

That thereupon said W.T. Sayward and the defendant Houghton entered into this agreement: That said Houghton should advance the sum of fifty thousand dollars for the purchase of the stock from Loomis, and that Sayward should procure said stock to be transferred by Loomis to Houghton, the same to be held by Houghton for the benefit of Sayward, upon the trust and condition that the latter should, "on the tender by him to said Houghton, within six months, of the sum so to be advanced by said Houghton for the purchase of said stock from said Loomis as aforesaid, with interest thereon from the date of said advance to the date of said tender, together with five thousand (\$5,000) dollars as a bonus to said Houghton receive from said Houghton a transfer of all of said stock"; that in pursuance of said agreement the money was so advanced by Houghton, and Sayward, on March 24, 1887, procured said stock to be transferred and delivered by Loomis to Houghton.

That thereafter, on June 11, 1887, Sayward died, and plaintiff was duly appointed administrator of his estate; that on September 15, 1887, and within six months from the date of the payment and advancement of said money by Houghton, plaintiff as such administrator, tendered and offered to Houghton the full amount required to be paid by plaintiff's intestate under said agreement, including a five thousand dollars bonus, and demanded a transfer and delivery of the stock; but that Houghton repudiated said agreement and refused said tender, and refused to deliver or transfer said stock. That plaintiff has ever since been, and is now, ready, able, and willing to pay said Houghton the full amount required to be paid under said contract, upon the transfer and delivery of said stock.

The prayer is, among other things, that Houghton be declared to hold said stock in trust for plaintiff's intestate, and that he be required to transfer and deliver the same to plaintiff as such administrator, upon the payment of the sum required under the terms of the contract.

We think the complaint states a cause of action and that the demurrer was improperly sustained. Respondent construes the action as one purely for the specific performance of a contract which he contends is wholly lacking in mutuality; that while the complaint alleges a promise on his part to convey, it discloses no corresponding obligation upon the part of plaintiff's intestate to purchase, but merely an option so to do, which could not have been enforced, and that therefore the contract alleged is one which equity will not enforce. But, assuming that the element of mutuality was lacking at the time the contract was entered into, it was supplied upon the offer of performance being made by plaintiff, since thereby the remedy to enforce it clearly became mutual. An original lack of mutuality in the right to specific performance will not preclude the enforcement of the contract where this want has been removed at the time the action is brought. (*Thurber v. Meves*, ante, p. 35, and cases there cited; *Vassault v. Edwards*, 43 Cal. 458; *Woodruff v. Woodruff*, 44 N. J. Eq. 349.) The principle is well stated in the case last cited, where the objection was, as here, that the covenant sued on was lacking in mutuality, in that it gave complainant the right to purchase, but did not provide that he must do so.

The objection is thus answered: "It is laid down, as a general rule, that equity will not specifically enforce the performance of a contract where, from its terms, a right does not arise in favor of each party against the other, and where each party is not entitled to the equitable remedy of specific execution of such obligation against the other contracting party. (Pomeroy on Specific Performance, sec. 162.) But this rule is subject to the modification that, if the quality originally lacking should be subsequently supplied, the enforcement of the contract may be made possible. The language of Chief Justice Beasley in *Richards v. Green*, 23 N. J. Eq. 536, 537, will suffice to indicate how the contract under consideration is made mutual and enforceable.

"The chief justice says: 'It is true that there are exceptions to the rule that a court of equity will not perform unilateral contracts, as, for instance, in those cases where an agreement, which the statute of fraud requires to be in writing, has been signed by one of the parties only; or when the contract by its terms gives to one party a right to the performance which it does not confer upon the other, an example of which is exhibited in the instance of a lease for years which gives an option to the lessee of purchasing during the term. But it will be observed that when such contracts come to be enforced in equity they cease to be unilateral, for, upon the filing of the bill, the party who was before unbound puts himself under the obligation of the contract. By his own act he makes the contract mutual, and the other party is enabled to enforce it.'" Numerous other authorities might be cited in support of the same principle.

But we do not construe the action as being essentially one for the specific performance of the contract, except in so far as such relief is necessarily incidental to the enforcement of the plaintiff's rights in the premises. The action is more in the nature of an action to enforce a trust arising in favor of plaintiff's intestate to have the stock restored to him upon a compliance with the terms of the contract. Respondent contends that no such trust arose; that the transaction was in effect a purchase of the stock by him from Loomis, precisely as if it had been at sheriff's sale or other public vendue, with a mere promise by him to hold it for the benefit of Sayward, for which promise there was no consideration; and, there being no fraud or deceit alleged, no en-

forceable trust was created or resulted. But the case is clearly not one of that complexion. The transaction did not constitute a purchase of the stock by respondent with his own money or for his own benefit. In legal effect it amounted to a purchase by Sayward with money advanced for the purpose by Houghton, the title being taken in the name of the latter and the stock delivered to him to be held merely as security for the repayment of the money so advanced, with the stipulated compensation for its use. Such being the nature of the transaction, there was obviously no want of consideration for respondent's promise to return or transfer the stock; and that there resulted under the facts a right in Sayward to such transfer, upon compliance with the terms of the contract, we entertain no doubt.

There is no merit in the other objections to the sufficiency of the complaint. There is nothing in the nature of the contract rendering it obnoxious to the statute of frauds; nor is there anything in the objection that plaintiff cannot maintain the action—conceding that this question may be raised under the general demurrer. (Code Civ. Proc., sec. 1582; *Knowles v. Murphy*, 107 Cal. 111.) The case of *Janes v. Throckmorton*, 57 Cal. 387, does not negative the right of the administrator to maintain an action such as this. The offer or tender of payment was sufficient. Section 1500 of the Civil Code does not prescribe the mode of tender but a method of “extinguishing” an obligation when that object is sought. (*Knowles v. Murphy, supra.*)

The judgment is reversed and cause remanded, with directions to overrule the demurrer.

Harrison, J., and Garoutte, J., concurred.

Hearing in Bank denied.

Upon the denial of the petition for a hearing in Bank, the following opinion was filed by Beatty, C. J., on the 7th of February, 1898:

BEATTY, C. J., dissenting.—I dissent from the order denying a rehearing of this case. As I construe the complaint it shows that Houghton purchased the stock for himself and merely gave plaintiff's intestate an option to purchase it from him upon payment within six months of fifty thousand dollars, with interest,

and a bonus of five thousand dollars. There was no advance of money to Sayward by way of loan and no personal obligation on the part of Sayward to pay Houghton anything. He merely bargained for an option to purchase.

For granting this option Houghton received a valuable consideration in being allowed at Sayward's request, and for his contingent benefit, to purchase the stock at a price below its real or estimated value. This consideration was sufficient to support Houghton's agreement granting the option, and Sayward's election to purchase and offer to perform, if made at any time within six months, would have supplied the element of mutuality necessary to warrant a decree of specific performance, if in other respects the contract was enforceable.

But if the action is one for specific performance (and I can regard it in no other light), the most serious question arises out of the fact that the intestate did not during his lifetime make his election to purchase, and the plaintiff, as administrator, has assumed to make it for him. He has, in other words, without any authority, so far as appears, from heir or creditor or the probate court, undertaken to bind the estate to pay Houghton fifty thousand dollars, with interest, and a bonus of five thousand dollars more in exchange for his stock. And, unless he has given Houghton the right to claim so much out of the assets of the estate in preference to creditors and heirs, the option has not been exercised—the estate is not bound, and if the estate is not bound Houghton is not bound. There must be mutuality of obligation when the action is commenced. To hold, therefore, that this is a case for specific performance would be to hold that an administrator of his own motion can appropriate the assets of an estate to the performance of an agreement to purchase resting in the option of his intestate, a doctrine to which the court should hesitate to commit itself.

The point made by respondent that the agreement set out in the complaint is within the statute of frauds (Civ. Code, sec. 1739) does not arise upon the demurrer, because it does not appear from the complaint that the agreement was not in writing. If, however, it was merely oral, and was, as I construe it, merely an agreement to sell, it was within the statute.

Neither does the objection that plaintiff's remedy is at law for

damages rather than in equity for specific performance arise on this general demurrer for want of facts. It is certainly doubtful whether—aside from the objections above referred to—the complaint states a case for equitable relief, but if those objections are unfounded it does state a cause of action.

[S. F. No. 362. In Bank.—January 7, 1898.]

W. F. GOAD et al., as Trustees, etc., Appellants, v. ANNIE A. MONTGOMERY et al., Respondents.

ESTATES OF DECEASED PERSONS—TRUST UNDER WILL — DECREE OF DISTRIBUTION TO TRUSTEES—CONCLUSIVENESS OF DECREE UPON CONSTRUCTION OF WILL—POWER OF TRUSTEES.—A decree of distribution to trustees under the will of a deceased person, unappealed from, is final and conclusive as to the terms of the trust defined therein, and as to the powers and duties of the trustees in regard to the trust property distributed to them, which are to be measured by the terms of the decree, and not by the terms of the will, which is superseded by the decree, and cannot be resorted to as evidence to impeach the decree, or to establish powers of the trustees not conferred by the decree; and where such decree distributed certain real estate and certain mortgage securities to the trustees in lieu of a large money legacy required by the will to be managed by the trustees for the benefit of the minor children of the testator, and the decree declared that the property so distributed to them was "in trust that the said trustees shall manage the said property and pay over and deliver one-half of said property so distributed to them," to each of the children upon their respectively attaining the age of majority, the trustees, though originally empowered by the will as executors to sell and convey and dispose of all the property owned by the testator without any order of court, have no power to sell or dispose of any of the property distributed to them by the decree in trust, except as directed and confirmed by order of a court of competent jurisdiction.

ID.—POWER OF COURT IN DISTRIBUTION OF ESTATE — CONSTRUCTION OF WILL IN DECREE.—A court having jurisdiction to distribute the estate of a deceased person has power to determine what distribution shall be made under its decree to trustees named in the will, and to construe the will of the testator, and determine his intention in creating a trust thereunder, and to distribute the estate to the trustees in accordance with its own views of his intention, and of the powers and duties of the trustees appointed thereunder; and, where no appeal is taken from its decree by the trustees, it becomes conclusive upon them, and they can no longer contend for a different construction from that which is imported by the terms of the decree, which must be regarded as a con-

struction by the court of the testator's intention, and is to be treated as if he had created the trust in the terms of the decree.

ID.—COINCIDENCE OF DECREES—PRIOR DECREE AUTHORIZING SUBSTITUTION OF PROPERTY FOR LEGACY—REFERENCE IN DECREE OF DISTRIBUTION.—A reference made in the decree of distribution to a prior decree made in an action brought by the trustees to have it determined that it was for the best interest of the estate to have the property distributed in kind among the parties interested, instead of converting it into money, by which decree certain designated property was substituted in lieu and in full satisfaction of a pecuniary legacy given to the minor children, is not to be considered as controlling the decree of distribution, though made in accordance therewith, and the court, in distributing the property, is to be deemed as acting in accordance with its own views.

ID.—TRUST TO MANAGE PROPERTY AND PAY OVER AND DELIVER THE SAME—POWER OF TRUSTEES.—A trust to manage property and deliver the same to beneficiaries named at their majority, in the absence of any other authority given expressly or by implication in the instrument creating the trust, requires that the property be kept and delivered in kind to the beneficiaries at the termination of the trust; and though a right to receive payment of bonds and mortgages, and to invest the sums so received in other securities, is consistent with the duty of the trustees to pay over and deliver the property held upon trust, their authority cannot be extended to include a right to sell or dispose of real estate so held by them upon trust, without a previous order or direction from the court.

ID.—POWER OF SALE BY EXECUTORS NOT APPLICABLE TO TRUST PROPERTY DISTRIBUTED TO TRUSTEES.—The rights and duties of executors are distinct from their rights and duties as trustees under the will, and a power of sale given to the executors as such is not applicable to trust property distributed to them as trustees under the will, and where no such power is conferred upon the trustees by the decree of distribution, it must be deemed not to exist in them as trustees under the will.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. A. A. Sanderson, Judge.

The facts are stated in the opinion of the court.

Platt & Bayne, and Rodgers & Paterson, for Appellants.

The court had jurisdiction to construe the will independently of the decree of distribution. (*Goldtree v. Thompson*, 79 Cal. 613.) The power to manage generally includes a power of sale. (*Hill v. Hill*, 6 Sim. 144, 145; *Commissioners v. Walker*, 38 Am. Dec. 435, par. 3.) The trustees were vested with the power to sell. (*Elmer v. Gray*, 73 Cal. 283, 284; *Morffew v. San*

Francisco etc. R. R. Co., 107 Cal. 587.) The substitution of other property made no change in the rights of the trustees. (*Wells, Fargo & Co. v. Robinson*, 13 Cal. 144; *Preuser v. Terry* (Ky. 1891,) 16 S. W. Rep. 133.)

Franklin K. Lane, and G. Whitfield Lane, for Minor Respondents.

The word "manage" can by no possibility include a power of sale, and there is no implied power of sale.

W. S. Goodfellow, for Elizabeth A. Rodgers, Respondent.

No power of sale was conferred upon the trustees by the instrument creating the trust, and the property must be preserved by the trustees and delivered over in kind. (2 Perry on Trusts, secs. 602 g, 769; Tiffany on Trusts, sec. 613; *Watson v. Cleveland*, 21 Conn. 541, 542; *Roosevelt v. Fulton*, 7 Cow. 81; *Harrison v. Harrison*, 2 Atk. 121; *Tape v. Lathbury*, L. R. 1 Eq. 174; *Billington's estate*, 3 Rawle, 55; *Thompson v. Peake*, 38 S. C. 440; *Hufbauer v. Jackson*, 91 Ga. 298.) The decree of distribution is controlling as to the rights of all persons legally or equitably entitled to any interest in the property of the estate. (*Siddall v. Harrison*, 73 Cal. 560, 563; *Estate of Hinckley*, 58 Cal. 457, 518.)

HARRISON, J.—Alexander Montgomery died November 4, 1893, leaving a last will and testament containing the following provisions:

"Fifth. I give and bequeath to W. F. Goad and A. W. Foster one million (\$1,000,000) dollars, in trust for my two minor children, Annie A. Montgomery and Hazel G. Montgomery, to be managed by said trustees.

"Said trustees shall pay over one-half thereof to my daughter, Annie A. Montgomery, when she attains the age of majority, and the remainder thereof to my daughter, Hazel G. Montgomery, when she attains the age of majority.

"Ninth. I hereby authorize my executors hereinafter named to sell, convey, and dispose of all property that I may own, as in their judgment may be for the best interest of said estate, without any order from any court."

"Twelfth. I hereby nominate and appoint W. F. Goad and A.

W. Foster executors of this my last will and testament, and request that no bonds be required of them as such executors, or as trustees hereinunder."

The will was admitted to probate in the superior court of San Francisco November 22, 1893, and letters testamentary issued to the executors therein named. In April, 1895, while the administration of the estate was still pending, Goad and Foster, as the trustees for the children of the deceased, brought an action in the superior court for San Francisco against the several parties interested in the estate, setting forth in their complaint the execution and terms of the will; that the estate of said deceased consisted mainly of real estate and of indebtedness secured by real estate; that there was not in the hands of the executors money sufficient to pay the several legacies named in the will; that owing to the depreciated condition of the market and business generally, any attempt to convert the real estate into money would not produce sufficient to pay the legacies, and would greatly postpone the settlement of the estate; that in view of these considerations it has been proposed that, instead of converting the property of the estate into money, it should be distributed in kind to those interested therein; that as trustees under the provisions of the will they had doubts as to their rights and power with reference to said proposal, and they thereupon asked the court to instruct and direct them as to their duties and powers relative thereto. Upon the trial of the cause the court found substantially in accordance with the averments in the complaint, and also that it was for the best interest of the children that certain property should be accepted by the trustees in lieu of the moneys due them under the bequest, and thereupon, May 3, 1895, rendered its judgment directing and instructing the trustees to accept certain designated property "in lieu and in full satisfaction of the pecuniary legacy bequeathed to them as aforesaid by said will, in trust for said Annie A. Montgomery and Hazel G. Montgomery," and also to consent that said property be by the decree of distribution to be made in said estate distributed to them in trust as aforesaid, in lieu and in full satisfaction of the said pecuniary legacy. Thereafter, May 6, 1895, the executors of said will filed their petition for a final distribution of the estate, and on May 15th, the court made its order and decree of distribution by which the property

designated in the above-named decree was distributed to the said Goad and Foster, as trustees under the will of said Montgomery, in trust for the children during their minority, "and in trust that the said trustees shall manage the said property and pay over and deliver one-half of said property, so distributed to them as aforesaid," to each of the said children upon their respectively attaining the age of majority. The decree of distribution contained also the following provision: "And said property so distributed to said W. F. Goad and A. W. Foster, as trustees as last aforesaid, is so distributed to them in lieu and in full satisfaction of the legacy of one million (\$1,000,000) dollars, and of the interest thereon bequeathed to said W. F. Goad and A. W. Foster as trustees for said Annie A. Montgomery and Hazel G. Montgomery in and by the provisions of the said will." The property thus distributed to the trustees includes sundry promissory notes secured by mortgages upon real estate, and also various parcels of land situated in different parts of this state, and the trustees being in doubt as to their powers and duties with reference to the said property—particularly in reference to their power to sell the real estate without the order and approval of the superior court—brought the present action for the purpose of having their rights, powers, and duties in the premises declared and defined. The superior court determined, among other things, that, as to the legacy of one million dollars given to them in trust by the will of Montgomery, the trustees were vested "with the same powers that all trustees in such cases possess, and none other, to wit, the right and power to control and handle the fund, to loan it out at interest on approved securities, such as bonds, mortgages, and the like, and to purchase secure interest bearing bonds therewith.

"That the trustees have no power or authority to sell or dispose of all or any portion of the property which was theretofore distributed to them as such trustees by said decree of distribution (in lieu of said pecuniary legatee in said will) made and entered in this court in the matter of the estate of said Alexander Montgomery, deceased, save and except as such sale or disposition may be directed by order of a court of competent jurisdiction, and subject to confirmation by such court.

"That the authority conferred on the executors of said will by

the provisions of the clause of said will marked and numbered 'Ninth' was meant to be and was limited to the sale, conveyance, and disposition of the property of said testator so far only as was required or advisable in the administration in probate and the distribution of said estate, and was not intended by said testator to confer any power of sale on the said trustees mentioned in said will."

From these portions of the judgment the plaintiffs have appealed.

The decree of distribution is the instrument by virtue of which the plaintiffs have received the property in trust for the children, and their powers and duties in regard to that property are to be measured by the terms of this decree. For the purpose of enabling the superior court to distribute the estate of a testator in accordance with his will, it is required to consider the will as well as the estate left by him, and to construe its terms for the purpose of determining his intention, and make its order or decree of distribution in accordance with such construction; but, as in the case of a judicial determination of any other instrument, the instrument is but evidence upon which the court acts in rendering its judgment. The judgment is the final determination of the rights of the parties to the proceeding, and upon its entry their rights are thereafter to be measured by the terms of the judgment, and not by the instrument. A will can no more be used as evidence to impeach the decree of distribution than can any other evidence upon which a judgment is rendered. Section 1665 of the Code of Civil Procedure requires the court, in making distribution of the estate, to distribute the residue of the estate in the hands of the executor "among the persons who by law are entitled thereto," and the provision in section 1666 that the court must name in the decree "the persons and the proportions or parts to which each shall be entitled" requires the court in making such decree to give a construction to the terms of the will. The further provision in the same section that "such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal," precludes all right to impeach the decree except upon an appeal, and causes the decree to supersede the will and to prevail over any provision therein which may be thought inconsistent

with the decree. The decree is conclusive, not only as to the persons who have any rights in the estate, but also as to the extent and limitation of their rights. Whether the distribution is to individuals in their own right, or to hold for others under specified trusts, the rights of all parties interested in the estate are determined by the decree, and thereafter it becomes immaterial to consider whether the will has received a proper construction. The court may incorporate the provisions of the will in its decree, either in express terms or by reference thereto, as was the case in *Goldtree v. Thompson*, 79 Cal. 613, where the decree distributed the property to the trustees to hold in the manner named and set forth in the will, "and to which reference is hereby particularly made as a guide to the trustees in the discharge of their trust." In such a case, the terms of the will become the language of the decree, but it is still the decree, and not the will by which the rights of the parties are determined.

If the plaintiffs herein had felt that the decree of distribution was erroneous or defective, in not giving to them the powers which, in their opinion, the terms of the will authorized to be conferred upon them, they could have appealed therefrom and had the decree corrected, but by their failure to appeal the decree has become conclusive upon them, and they can no longer contend for a different construction than such as its terms import. (*Estate of Garraud*, 36 Cal. 277; *Daly v. Pennie*, 86 Cal. 552; 21 Am. St. Rep. 61; *William Hill Co. v. Lawler*, 116 Cal. 359.) In *Estate of Hinckley*, 58 Cal. 457, an appeal was taken directly from the decree of distribution, and the court below was directed to modify its decree in conformity with what this court held to be a correct construction of the will, and in its opinion, after indorsing the following language of the lower court, viz: "It is under our system the necessary province of a probate court to inquire and determine whether a valid trust has been created," said also: "We may add that it is within the province of the probate court to define the rights of all who have legally or equitably any interest in the property of the estate derived from the will, whether they are entitled to any present enjoyment or their interests are contingent;" thus clearly indicating that, in the absence of any appeal from that decree, the action of the probate court would have been conclusive.

In the decree of distribution the court finds as a fact: "That the property of said estate is of great variety and extent; that it has been found impracticable to convert the same into money without a probable loss to the legatees and devisees named in said will, and that, if the property of said estate should be held until converted into money, the delay in the distribution would be indefinite;" and the court also found as another fact that for these and other reasons the legatees, Goad and Foster, had been authorized by a decree rendered in an action brought by them for that purpose to accept the property which was distributed to them in lieu and full satisfaction of the legacy to them provided in the will; but, while these facts are recited in the decree and were considered by the court, the decree of distribution does not purport to have been made by reason of such judgment, or to have been dependent thereon. Counsel have not discussed the effect of this judgment, and it is unnecessary for us to consider its effect, or whether there was any authority in the court to render it. It would be an anomaly in jurisprudence that a court which is vested with full jurisdiction in matters of probate should be controlled in the exercise of that jurisdiction by the action of a co-ordinate court which has neither controlling nor revisory jurisdiction in such matters. The court was not required to follow that judgment, but could distribute the estate in accordance with its own views (see *Siddall v. Harrison*, 73 Cal. 560); and, inasmuch as the decree of distribution does not purport to have been made by reason of such judgment, it must be regarded as having been made upon an exercise by the court of its own judgment upon the construction to be given to the will and the consideration of the rights of the parties thereunder. The fact that the distribution which it made to the plaintiffs is of the same property as that which they were authorized to receive by the said judgment is only a coincidence, and not a consequence.

By the terms of the decree of distribution the property distributed to the plaintiffs was to be held by them in trust, that they should "manage the said property and pay over and deliver the same" to the children as they should respectively attain the age of majority. This distribution of the property, "in lieu and in full satisfaction of the legacy of one million dollars," must be regarded as a construction by the court of the testator's inten-

tion in creating the trust, and is to be treated as if he had created the trust in the terms used in the decree. In the absence of any authority given expressly or by implication in the instrument creating a trust, property which is placed in the hands of trustees, to be held by them for a limited time, or until the happening of an event, must be kept by them and delivered in kind to the beneficiaries at the termination of the trust. (*Harrison v. Harrison*, 2 Atk. 121.) Mr. Perry says: "Under no circumstances can a trustee or guardian of an infant convert the ward's real estate into personality by a sale without the order or decree or license of a court." (Perry on Trusts, sec. 609.) The trust herein to "manage" the property implies, by force of the term used, that the trustees are to retain it under their control, and is inconsistent with the idea that they have authority to sell or otherwise dispose of it. "To manage an estate is, in common parlance, as well as legal acceptance, no authority to part with the entire interest." (*Roosevelt v. Fulton*, 7 Cow. 81.) The further provision that the trustees are to "pay over and deliver" to the beneficiaries "the property so distributed to them" at the termination of the trust indicates that, so far as is consistent with the nature of the property, the beneficiaries are entitled to receive it in the same condition in which it was received by the trustees. This provision applies to the different kinds of property distributed to the trustees, and indicates that of said property—*reddendo singula singulis*—the children upon reaching their majority are to be paid that which is susceptible of payment, and to have delivered to them that which is not so susceptible. It was shown that the property received by the trustees consisted of real estate amounting in value to about four hundred thousand dollars, and bonds and mortgages amounting in value to about six hundred thousand dollars. The duty of the trustees in regard to the bonds and mortgages that may mature during the continuance of the trust is not involved in the present appeal. Their right to receive payment thereon, and to invest the sums so received in other securities, is consistent with their duty to pay over and deliver to the children the property distributed to them, but cannot be extended to include the right to sell or otherwise dispose of the real estate, without a previous order or direction from the court.

Although the persons named in the will as its executors are the same as those to whom the testator directed the property to be distributed in trust for his children, yet the power of sale conferred upon the executors was not given by him to them as trustees, but terminated with their discharge as executors. The fact that the two offices are held successively by the same individuals does not give to them in the exercise of one office the power that had been conferred for the exercise of the other. Their rights and duties as executors were quite distinct from the duties imposed upon them as trustees, and their powers and duties as trustees did not begin until as executors they had ceased to have any control over the property, and, as above seen, the decree of distribution is alone to be considered for the purpose of ascertaining their powers. The testator may have been willing to give this power of sale to his executors, since he knew that every sale by them must be confirmed by the court before the title to the land would pass from his estate, while he might have been unwilling to vest the same persons with a power whose exercise would be without such supervision and control.

The judgment is affirmed.

McFarland, J., Henshaw, J., Garoutte, J., and Van Fleet, J., concurred.

[Sac. No. 329. Department One.—January 8, 1898.]

In the Matter of the Insolvency of THE VISALIA CITY
WATER COMPANY.

INVOLUNTARY INSOLVENCY—INSUFFICIENT VERIFICATION OF PETITION — JURISDICTIONAL REQUIREMENT—VOID PETITION NOT AMENDABLE — CONSTRUCTION OF CODE.—The verification of a petition in involuntary insolvency by three creditors of the insolvent is necessary to the validity of the petition, and the requirement of it is jurisdictional; and where it appeared that at the time of the verification of the petition by three creditors it contained only averments in reference to their claims, and that the claims of two other creditors verifying the petition were subsequently inserted the verification by the three creditors is a nullity, and the petition, not being verified as required by the statute, is void, and, being void, is not amendable under section 9 of the Insolvent Act, which is intended to provide only for the amendment of a valid petition, and does

not refer to a void petition which no amendment can validate, so as to confer upon the court jurisdiction of the subject matter of the proceeding which it did not previously have.

ID.—FORM OF BOND.—The Insolvency Act contemplates the filing of a bond with two sureties, and all the petitioning creditors as principals.

APPEAL from an order of the Superior Court of Tulare County adjudicating the insolvency of a debtor corporation and from an order denying a new trial. William W. Cross, Judge.

The facts are stated in the opinion of the court.

Charles G. Lamberson, and T. E. Gibbon, for Appellant.

E. T. Dunning, and W. B. Wallace, for Respondent.

GAROUTTE, J.—This appeal involves the validity of an order of the superior court declaring the Visalia City Water Company, a corporation, an insolvent debtor. The proceeding was inaugurated by the creditors of the corporation, and the petition was filed February 8, 1896. Upon its face it appeared to have been verified by three creditors at Los Angeles February 6, 1896, and by two creditors in the county of Tulare upon February 7, 1896. When the petition was filed the court made an order that the alleged insolvent show cause upon February 14th why it should not be declared an insolvent debtor. Upon the day set for the hearing of the order to show cause, it was developed by the evidence that, at the time the petition was verified by the three Los Angeles creditors, neither the names nor the claims of the Tulare county creditors, who thereafter verified the petition, were set out in the petition, and that the allegations of the petition as to the Tulare county creditors were placed therein after the verification by the Los Angeles creditors. The foregoing facts having appeared, the court made an order allowing the petitioning creditors to file an amended petition. The amended petition as filed was a duplicate of the original, except as to the verification. Objections were made by the water company to the sufficiency of the original petition by reason of the matters stated, and further objections were also made to the order of the court allowing the petition to be amended as aforesaid. These objections present matters for serious consideration.

Did the court have the right to allow the creditors to file an

amended petition? This right is claimed by virtue of section 9 of the Insolvent Act, wherein it is provided: "The petitioners may from time to time amend and correct the petition, so that the same shall conform to the facts, by leave of the court before which the proceedings are pending, such amendment or amendments to relate back to and be received as if embraced in the original petition." It will be observed that this provision of the law treats of the facts set out, or which may be set out, in the petition. It does not refer to a void petition; a petition absolutely void is beyond amendment. If the original petition was void, the court obtained no jurisdiction over the subject matter of the proceeding, and no amendment could validate it. The bond accompanied the original petition. The order to show cause was based upon that petition, and, if that petition was void, it would seem that the whole proceeding must fall. The Insolvency Act requires the petition to be verified by three creditors. This verification is necessary to the validity of the petition. An unverified petition could not form the basis of the proceeding, for this requirement is essentially jurisdictional.

In the case of *La Point v. Boulware*, 104 Cal. 264, it is held that insolvency proceedings are not commenced within the meaning of the Insolvent Act until a petition is filed which will support an adjudication in insolvency; and the fact that this act was amended in 1895, so that amendments to the petition relate back to and are to be received as if embraced in the original petition, in no way changes or modifies the principle laid down in that case. The original petition in this case was fatally defective. The verification by the three Los Angeles creditors went for naught. It was not a verification of the petition as filed. The petition in material parts was different when filed. Hence, the petition as filed was only verified by the two Tulare county creditors. A verification by two creditors gave it no more value as a petition, from a jurisdictional standpoint, than if verified by none.

Objection is made to the sufficiency of the bond which accompanied the original petition. Owing to the views already expressed, it is sufficient to say that we are satisfied the Insolvency Act contemplates the filing of a bond with two sureties and all the petitioning creditors as principals.

Judgment and order reversed and cause remanded.

Harrison, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[S. F. No. 648. Department One.—January 8, 1898.]

FLETCHER F. RYER, Respondent, v. PAUL OESTING et al., Appellants.

SERVICES IN OBTAINING RENEWAL OF LEASE—ORAL AGREEMENT FOR COMPENSATION—DELIVERY OF LEASE FOR LESS TERM—PRIOR WRITTEN CONTRACT—MERGER—ESTOPPEL.—An oral agreement made between plaintiff and defendants that plaintiff should use his services in obtaining the renewal of a ten-year lease, which was about to expire, in consideration of a monthly payment to be made to plaintiff during the renewed term, the desire being expressed for a new lease of ten years, is merged in a written contract to pay such compensation for a shorter term of three years, which was entered into prior to the delivery of a new lease therefor, which had been executed by the lessor and placed in the possession of plaintiff, and which he was under no obligation to deliver, unless such written contract was made; and the essential act of the delivery of the lease remaining to be performed when the written contract was entered into, his entire service in procuring a new lease, which was one transaction, must be deemed to have been made under the written contract, and defendants are estopped by such contract from objecting that the services were rendered under a different oral agreement, and that plaintiff could only recover upon a *quantum meruit*, and not under the written contract, and from objecting that the lease delivered to and accepted by them was not in accordance with the terms of the contract.

ID.—SURRENDER OF LEASE—CONTINUANCE OF OBLIGATION TO PLAINTIFF. The terms of the contract being to pay a monthly compensation during the period for which the premises were leased, the defendants could not escape their obligation to make such monthly payments, by surrender of the lease before the expiration of the term.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

J. D. Sullivan, and Herbert Choynski, for Appellants.

R. H. Countryman, for Respondent.

VAN FLEET, J.—Appeal by defendants from an order denying them a new trial. The action is to recover certain installments alleged to be due plaintiff under a contract in writing between him and defendants which, by its terms, provided that if plaintiff, through his efforts, labor, and services, should procure and obtain for defendants from his father, Dr. Ryer, the owner of certain premises, a lease thereof for the term of three years, commencing on the first day of August, 1890, they would pay plaintiff for his services in securing the lease the sum of four hundred dollars per month during the entire term of such lease; it being alleged that in pursuance of such written contract plaintiff did, by his efforts and services, procure such lease in accordance with the terms thereof.

The answer admitted the execution of the written contract, but denied that the lease obtained by plaintiff was procured thereunder, and alleged in substance that the lease was procured in pursuance of another and verbal agreement made before the execution of the writing.

The evidence showed without substantial conflict that defendants, who were at the time occupying, under lease from plaintiff's father, certain premises in the city of San Francisco as a drugstore, came to plaintiff in May, 1890, and represented that their lease would expire on the 31st of July following; that they desired a renewal thereof, but that they had fallen under the displeasure of Dr. Ryer, and he had positively refused to renew the lease or permit them to remain upon the premises longer than the term of their then existing lease; that their business was of great value, the income therefrom being several thousand dollars per month, and the goodwill alone worth more than thirty thousand dollars; that while the business was thus valuable and lucrative in its then location, the removal meant its practical destruction and their ruin. In this dilemma they desired to enlist plaintiff's services to procure an extension of their lease, and they proposed that if plaintiff would undertake to use his good offices with his father in their behalf, and should succeed in procuring an extension of their lease, they would give

plaintiff either an interest in the business or its equivalent in monthly payments during the term of the lease, as he might elect. Plaintiff finally consented to use his efforts with his father in an endeavor to secure a new lease for defendants, accepting the proposition for a compensation in monthly payments; and plaintiff immediately set about making the effort to induce his father to renew the lease, interceding with his father on several occasions, and procuring others to do so, and informing him that it would be to plaintiff's benefit if the lease was made. Defendants' first desire was a renewal for a term of ten years, but this Dr. Ryer flatly refused, and at first refused to renew the lease for any term, but he was eventually induced by plaintiff, after much and repeated effort, to give defendants a lease for three years, and this defendants agreed to accept. Thereupon plaintiff drafted the agreement counted upon, which in all substantial respects reflects the previous oral understanding of the parties, and, procuring the lease to be signed by his father, took the two papers to defendants to be executed by them. Defendants, after being permitted by plaintiff to read the lease, and finding it satisfactory, executed and delivered to plaintiff the contract, and thereupon plaintiff delivered to them the lease, which was accepted and signed by them. The stipulated payments were regularly made to plaintiff in accordance with the contract down to March, 1892, when defendants, without the knowledge or consent of plaintiff, procured their lease to be canceled by Dr. Ryer, sold out their business, and thereafter refused to further recognize the obligation of their contract with plaintiff, or to make further payments thereunder. Thereupon this action was brought, resulting in a verdict and judgment for plaintiff.

Defendants' main contention is, that a new trial should have been granted because of a failure of proof to sustain the cause of action alleged, in that plaintiff counts upon the agreement in writing, whereas the evidence shows that all plaintiff did in the matter was performed under the verbal understanding antedating the writing, by the terms of which it is contended plaintiff was to procure a lease for ten years instead of three; that defendants' offer of compensation was made upon the basis of such ten years' lease, and plaintiff having performed a service of

less value than that contracted for, he cannot recover upon the contract, but, if at all, only upon a *quantum meruit*, for the reasonable value of his services. But there is no real merit in this contention. It is true that the original desire expressed by defendants was for a ten year lease, but it clearly appears that before the lease was procured defendants knew that it could not be had for that term, and had consented to accept one for three years. And while it is also true that the efforts of plaintiff in obtaining the lease had been performed before the written contract for plaintiff's compensation was executed, it is a misconception of the effect of the evidence to say that the obtaining of the lease, so far as defendants were concerned, was not had under that contract. It can make no difference, under the facts disclosed, that the labor and efforts required of plaintiff in influencing his father to renew the lease were expended before the actual execution of the writing. The thing required of him as a consideration of defendants' obligation was the procuring of the lease for them, and this was not accomplished or completed, so far as their rights thereto were concerned, until the delivery of the lease by plaintiff to them, and its acceptance. While plaintiff had secured the execution of the lease by his father, he was under no obligation to deliver the same to the defendants until they had either paid or provided for his compensation. He was not their agent in the transaction in the sense that delivery to him was delivery to them. He was under no obligation to deliver the instrument until they had given him satisfactory assurance for his compensation. He could have returned the paper to his father and abandoned the enterprise at any time before its delivery to defendants, and have rested under no liability to the latter. This defendants no doubt realized and understood, since they executed the writing, not only knowing that the lease was then in plaintiff's possession, but after they had read and approved of its terms. The essential act of delivery to complete plaintiff's part of the contract remaining at the time the written agreement was entered into, his entire service, which was one transaction, is to be deemed to have been thereunder, since all previous oral negotiations were merged therein; and defendants are estopped by their writing from making the objection now urged.

This is very evidently the theory upon which the instruction assailed by defendants was given to the jury, and the instruction was clearly right.

Defendants are also estopped from making the further objection that the lease was not in accordance with the terms of their contract, they having accepted and acted under it without objection.

The further point, that under the terms of the contract they were only obligated to make the monthly payments while they continued to hold under the lease, is wholly without support.

There is no error in the record, and the order is affirmed.

Harrison, J., and Garoutte, J., concurred.

Hearing in Bank denied.

[S. F. No. 754. Department One.—January 11, 1893.]

In the Matter of the Trust of JULIUS A. TRESCONY et al., Trustees for the benefit of Anita Christal and Leo Albert Christal, Minors. ANITA CHRISTAL et al., Appellants, v. JULIUS A. TRESCONY et al., Trustee, etc., Respondents.

ESTATES OF DECEASED PERSONS—TRUSTS UNDER WILL—CONCLUSIVENESS OF DECREE OF DISTRIBUTION—COLLATERAL ATTACK—VALIDITY OF TRUSTS—SETTLEMENT OF ACCOUNTS OF TRUSTEES.—A decree of distribution to trustees named in the will is a judicial construction of the will, and is a determination of the rights of all parties interested in the estate, and is a measure of their rights, and the will can no longer be considered except upon a direct appeal from the decree, and, though erroneous, if it is unappealed from, the decree is conclusive upon all persons interested in the estate; and minor beneficiaries of the trust, whose rights were limited by the decree to one-third of the estate, the other two-thirds having been distributed to other beneficiaries under trusts, the validity of which was determined by the decree of distribution, cannot attack such other trusts collaterally upon a settlement of the accounts of the trustees, upon the ground that they were void as being in restraint of alienation, and that the trustees should account for the whole estate for the benefit of the minors.

ID.—PARTITION OF LAND HELD IN TRUST—CONCLUSIVENESS OF DECREE—ACCOUNTS OF TRUSTEES.—A decree of partition of the land in which the trustees held an undivided interest in trust, in an action

in which the court had jurisdiction of all the parties interested in the land, allotting different portions of it in severalty to the several parties before it, is a determination of the rights of the parties, which became conclusive of their rights, where no appeal was taken therefrom; and accounts of the trustees embracing all of the land allotted to them by such decree in trust for the beneficiaries, represented by them, cannot be objected to as not embracing the whole of the trust estate.

APPEAL from an order of the Superior Court of Monterey County settling the accounts of trustees. N. A. Dorn, Judge.

The facts are stated in the opinion of the court.

Pierson & Mitchell, for Appellants.

G. A. Daugherty, J. K. Alexander, and S. F. Leib, for Respondents.

HARRISON, J.—Albert Trescony by his last will and testament disposed of his estate to various devisees, and on April 2, 1894, at the close of the administration of his estate, a decree of distribution was made distributing the estate in accordance with the terms of the will. By this decree one-third of the estate was distributed to the respondents herein, as trustees, upon certain trusts expressed therein, for the appellants, who are two minor children of a deceased daughter of the testator; and the other two-thirds of the estate were distributed to other beneficiaries under the will. After the entry of this decree of distribution certain distributees commenced an action against the others, including the respondents and the appellants, in the superior court of the county of Monterey, for the partition of the real estate according to their respective rights, and in that action an interlocutory decree was entered November 26, 1894, determining the rights of the respective parties in the land, and directing partition in accordance therewith, and appointing referees to make such partition. August 24, 1895, the referees filed with the court a report of their proceedings for such partition, and the court thereafter, August 28, 1895, confirmed their report, and on the same day made and entered its decree partitioning the land in accordance therewith. By this decree certain specific portions of the land were allotted and set apart in severalty to the respondents herein, as trustees, for the use and benefit of the appellants.

upon the trusts which were named in the will of the decedent; and other specific portions of the land were allotted to the other parties to the action. November 9, 1895, the respondents filed with the superior court for its approval and allowance an account of their management of the trust property, and at the hearing thereof, on the day fixed by the court, objection to its allowance was filed on behalf of the appellants, on the ground that the account purports to account for only one-third of the estate of the testator, whereas, under his last will and testament and the decree of distribution, the respondents took the entire estate of the testator as trustees for the benefit of the appellants; the argument in support of the objection being that the trusts created by the will for the other two-thirds of the estate are void, as being in restraint of alienation, and therefore the appellants became entitled to the whole of the estate, and the trustees should account therefor. The court overruled the objections, and made its order settling the account as presented, from which the minors have appealed.

The decree of distribution was a judicial construction of the will of the decedent, and a determination by the court as well of the persons who were entitled to his estate, as of the proportions or parts to which each of those persons were entitled, and was "conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal." (Code Civ. Proc., sec. 1666.) The will of the testator was evidence before the court when it was called upon to determine how the estate should be distributed, but upon the entry of the decree of distribution that decree became the measure of the rights of the parties interested in the estate, and the will was entitled to no further consideration for that purpose, except upon a direct appeal from that decree. If, in making the decree, the court erred, either in matter of fact or in the application of the law to the facts before it, the decree, unless appealed from, was a conclusive determination of the matters determined, and is not subject to collateral attack. (*Estate of Hinckley*, 58 Cal. 518; *Daly v. Pennie*, 86 Cal. 552; 21 Am. St. Rep. 61; *William Hill Co. v. Lawler*, 116 Cal. 359; *Crew v. Pratt*, ante, p. 131, *Goldtree v. Al-lison*, ante, p. 344; *Goad v. Montgomery*, ante, p. 552.) As no appeal was taken from the decree of distribution in the estate

of Albert Trescony, that decree became conclusive as to the rights of the parties to the estate distributed. Even if it be conceded that the trusts created by the will were in restraint of alienation, contrary to the provisions of the statutes upon that subject, the decree of distribution is not for that reason to be disregarded. (*Daly v. Pennie, supra; Crew v. Pratt, supra.*)

In the proceedings for a partition of this land, subsequently brought in the superior court, that court had jurisdiction of all the parties claiming an interest therein, and its judgment, allotting different portions of the land in severalty to the several parties before it, was also a determination of the rights of those parties to any portion of the tract, and, no appeal having been taken from this judgment, it also became conclusive of their rights. As it is not claimed that the account rendered by the respondents does not embrace all the estate allotted by this decree to them in trust for the appellants, the objections to the account were properly overruled by the court.

The order is affirmed.

Garoutte, J., and Van Fleet, J., concurred.

[S. F. Nos. 881, 882. Department Two.—January 11, 1898.]

In the Matter of the Estate of ANN CALLAGHAN, Deceased.

ESTATES OF DECEASED PERSONS—DISTRIBUTION—PRETERMITTED HEIR—CONSTRUCTION OF STATUTE—FAILURE OF APPARENT PROVISION IN WILL—PAROL EVIDENCE INADMISSIBLE.—The failure of an apparent provision in the will of a testatrix for the issue of a deceased child, by reason of the testatrix having parted with land devised to them, is not an "omission to provide," within the meaning of section 1307 of the Civil Code; and upon petition of the grandchildren for a partial distribution of other estate of the testator, claiming as pretermitted heirs, parol evidence is inadmissible to show that the land devised to them was not owned by the testatrix at the time of the making of the will, or at the time of her death, and that the grandchildren had never received any part of the estate of the testatrix by way of advancement.

ID.—OBJECT OF STATUTE—FORGETFULNESS OF TESTATOR — MENTION IN WILL—MISTAKE NOT TO BE REFORMED.—The object of the statute in regard to pretermitted heirs is not to compel the testator to make provisions for any child, but solely to protect the children

against forgetful omission or oversight, and the failure to allude to them in the will is made evidence that they were omitted through forgetfulness of their existence; but when they are present to the mind of the testator, the statute affords no protection if provision is not made for them, and the fact that they are mentioned by the testator in the will is conclusive evidence that they were present to his mind; and, in such case, no mistake in the will in apparently, but not really, providing for them, can be reformed or corrected after the death of the testator; and parol evidence to show such mistake is inadmissible, where there is no question of imperfect description or identity of either the persons or property mentioned in the will.

ID.—APPEAL BY GUARDIAN OF MINORS — PARTIES — QUESTION UNDECIDED.—The question whether an appeal can be properly taken in the name of a guardian of minor children as trustee of an express trust, or whether such appeal must be taken in the name of the ward, not decided; but held, Mr. Justice Temple, that such an appeal must be taken in the name of the ward, and should be dismissed, when taken in the name of the guardian.

APPEAL from orders of the Superior Court of the City and County of San Francisco, granting petitions of respondent and denying the petition of appellants for partial distribution of the estate of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Myrick & Deering, for Appellants.

Bishop & Wheeler, Knight & Heggerty, James H. Creely, and W. S. Wood, for Respondents.

McFARLAND, J.—The estate of Ann Callaghan, under administration in the probate court, being in a condition to warrant a partial distribution, petitions for such partial distribution were filed by Daniel T. Callaghan, son of the decedent, and Mary A. Bailey, daughter of the decedent, and certain of said Mary's children. Said Daniel and Mary were the only surviving children; and the petitions for distribution excluded any interest of Bertha Callaghan and Josephine Callaghan, who were grandchildren of the decedent and minor children of Sherwood Callaghan, who was the son of the decedent and died during her lifetime. These two grandchildren, Bertha and Josephine, filed oppositions to said petitions for distribution; and they also filed a petition for distribution, in which they claimed that a certain interest in the estate should be distributed to them. The probate

court granted the petition of Daniel T. Callaghan and Mary A. Bailey and others, and denied the petition of said grandchildren, who appeal from the order granting the former petition, and also from the order denying their petition. The appeals are brought here in two separate transcripts, numbered 881 and 882; but as the same question arises in each case, the two appeals may be considered together.

The decedent, Ann Callaghan, left a will, and the question here involved arises out of such will. The appellants contend that she omitted to provide for them in her will, and that therefore they are entitled to the same share in her estate which they would have had if she had died intestate, under section 1307 of the Civil Code. That section is as follows: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." By the will nearly all the property of the deceased, with the exception of a few legacies, is given to her said son Daniel T. and her daughter Mary A. Bailey, and her children, and the fifth subdivision of the will is as follows: "Fifth. I own six acres of land, more or less, in Alameda, Alameda county, state of California. Said land I give, devise, and bequeath to Bertha and Josephine, the two children of Sherwood Callaghan, to be held and enjoyed by them during their lives and the life of the survivor of them; and in case of their death, leaving issues, then to such issue, share and share alike, according to representation. But, in case the said Bertha and Josephine die without issue, then said property shall revert to my son, Daniel Callaghan, and my daughter, Mary Bailey, share and share alike." This is the only mention made in the will of the grandchildren, Bertha and Josephine. Upon the trial of the petitions in the court below, the appellants offered to prove that the testatrix did not own any land in Alameda county at the time the will was made, or thereafter up to the time of her death, and that the estate did not own or claim to own any land in said county; that the testatrix once owned a tract of twenty-five acres in Alameda county, but has sold and conveyed the same to one Hawley before the mak-

ing of the will, and had never owned or claimed to own any land in said county other than that so sold to Hawley; and that said grandchildren had never received any portion of the estate of testatrix in her lifetime by way of advancements. This offered evidence was objected to by respondents upon the ground that it was irrelevant, immaterial, etc., and the objection was sustained and exception reserved. These offers, rulings and exceptions present the question here involved, viz., whether the will omitted to provide for appellants within the meaning of said section 1307.

We think that the rulings of the court below were correct. The words "omits to provide," as used in said section, mean simply an omission to make a provision in the will, and has no reference to the pecuniary value of such provision. It is apparent that the code provision in question expresses no intent to in any way limit the disposing power of a testator, or compel him to provide for any child; for it clearly provides how the testator may decline to give any thing to any such relative. This being so, what is the object of the provision? Nearly all the states have provisions substantially the same as that here under consideration; and, as such a provision is not intended as a limitation of the power of a person to dispose of his property by will, it has been uniformly held that the provision applies only to a case where a child or descendant is unknown or forgotten, or for some reason unintentionally overlooked. "The object of the statute was to guard the testator against the effect of a mistake in providing for some of his children to the exclusion of others, through forgetfulness of their existence, or in otherwise disposing of his property in such forgetfulness, and the failure to allude to them is made evidence that they were so forgotten." (*McCourtney v. Mathes*, 47 Mo. 533.) In the case of *Payne v. Payne*, 18 Cal. 291, the exact provision as it now stands in the code was under review, and Field, C. J., speaking for the court, said: "The children are mentioned three times in the codicil, showing that they were in the mind of the testator at the time, and not overlooked in the disposition of his property. And the only object of the statute is to protect the children against omission or oversight, which not infrequently arises from sickness, old age, or other infirmity, or peculiar circumstances under which the will is executed. When, however, the children are present in the mind of

the testator, and the fact that they were mentioned by him is conclusive evidence of this, the statute affords no protection if provision is not made for them." We do not see any controlling force in the suggestion, made by appellants, that in section 1307 the word "mentioned" is not used, while it is used in certain preceding sections; the omission of that word does not change the purpose and intent of the section as above declared. An argument similar in character to this is fully answered by the court, through Crockett, J., in the case of *In re Garraud*, 35 Cal. 342. In the case at bar, the appellants were not only mentioned, but an express specific provision was made for them in the body of the will, and there can therefore be no pretense that they were unknown, forgotten, or unintentionally overlooked.

The only purpose of the evidence offered by appellants and rejected by the court was to show, not that the appellants had been forgotten or overlooked, or not expressly provided for, but that the provision made for them was a mistake of the testator. It is not by any means clear that such evidence, if admitted, would have established such a mistake; the testatrix may have known that she had no land in Alameda county, and may have intended thus to dispose of the hopes of her grandchildren, and it is admitted that her declarations could not have been introduced to show a different intent. But the most that appellants can claim, is, that the evidence would have shown a mistake; and it is established law that after the death of a testator a mistake in his will cannot be corrected, nor can the will be reformed or remodeled. "No bill in equity lies to reform a will, because its author is dead, and his intent can only be known from the language he has used." (*Patch v. White*, 117 U. S. 219.) "It is not here attempted to reform the instrument so as to make it speak really the intentions of the testator. No court can do this." (3 Redfield on Wills, 49.) The evidence offered by appellant was therefore properly excluded. Of course, where in a will there is an imperfect description of either person or property, the description may be made more certain when it can be done either from the context of the will or from extrinsic evidence; and such is the meaning of section 1340 of the Civil Code, relied on to some extent by appellants. But in the case at bar there was no imperfect description of either the persons or the property mentioned in the will.

The appellants were expressly named in the will, and there is no doubt that they were intended; and there is no question made as to what tract of land in Alameda county was intended. It is not contended that, either by extrinsic evidence or otherwise, the description of the property mentioned in the will could be made to apply to any other tract of land; and appellants do not claim any other particular piece of land. The case is, therefore, materially different from *Patch v. White*, *supra*, cited by appellants. That case was an action of ejectment in which the plaintiff claimed title to the lot of land in contest under a devisee in a certain will; the question was whether or not the lot was the one devised to plaintiff's grantor; and the court, by a bare majority, four justices dissenting, held that there was a latent ambiguity, and that parol evidence was admissible to show that an imperfect description in the will should be applied to the lot in contest. No such question arises in the case at bar.

The above views make it unnecessary to consider the contention of respondents that these appeals are improperly taken in the name of the guardian of the grandchildren.

The orders appealed from are affirmed.

Henshaw, J., concurred.

TEMPLE, J., concurring.—I concur in the opinion, but I think the appeal should be dismissed. The guardian may appear and prosecute or defend actions for his ward, but under our code must do so in the name of his ward. Section 369 of the Code of Civil Procedure expressly authorizes administrators and executors to sue as though trustees of an express trust. In some states this same privilege is awarded to guardians, but our code provides (Code Civ. Proc., sec. 373) that a ward shall himself be a party to a suit which shall bind his estate.

It has been held in some jurisdictions, where there is no special statutory provision upon the subject, that a guardian can maintain an action in his own name upon an obligation made by himself as guardian, and also that as to such contracts he may be sued. Such cases also hold that he is the owner of and personally liable on such contracts and only liable to account in reference to them as trustee of his ward. In case of his death, such choses

in action go to his representatives. (*Chitwood v. Cromwell*, 12 Heisk. 658.)

Whether in the probate court the guardian should appear to object to proposed distribution in his own name as guardian or in the name of his ward was immaterial, but no one can appeal from a judgment except the parties to it, or those in privity with the parties. And even as to parties the record must show that their interests are or may be affected by the judgment.

The subject will be found fully considered in 9 Encyclopedia of Pleading and Practice, 929. (Also, Schouler's Domestic Relations, sec. 343, note. See, also, *Fox v. Minor*, 32 Cal. 112; 91 Am. Dec. 566; *Wilson v. Wilson*, 36 Cal. 451; 95 Am. Dec. 194; *Justice v. Ott*, 87 Cal. 531; *O'Shea v. Wilkinson*, 95 Cal. 454; *Dixon v. Cordozo*, 106 Cal. 506.)

In *In re Rose*, 66 Cal. 241, this question was not raised. The question there was whether the general guardian or the attorney appointed by the probate judge to represent the minor should appear for the minor in the probate court. Nothing is there said as to the propriety of the appeal taken in the name of the guardian, and the record does not show that any objection was made on that ground. Under such circumstances, we cannot presume that it was intended to overrule other decisions upon this question without noticing them.

The guardian was not in privity with his ward, nor is he a person interested. The judgment was not for or against him, but if he can appeal in his own name he is thereby made a party, and the judgment here would be for or against him. This is in violation of the code, which provides that in such cases the ward shall be the party, although he must appear by guardian.

I also concur in the judgment.

Hearing in Bank denied.

CXIX. CAL.—37.

[Crim. No. 386. In Bank. —January 11, 1898.]

Ex Parte CHRIS P. PETERSON on Habeas Corpus.

CRIMINAL LAW—WILLFUL AND UNLAWFUL USE OF NO. 8 SHOTGUN—INSUFFICIENT COMPLAINT—PURPOSE OF USE — STATUTORY CONSTRUCTION—JURISDICTION — HABEAS CORPUS.—Section 27 of the Penal Code, as amended March 9, 1897, making the willful and unlawful use of a shotgun of a larger caliber than that commonly known as a No. 10 gauge a misdemeanor is not to be construed as making it a misdemeanor to use a larger shotgun in any possible way, or for any possible purpose, but, taking the whole context of the act, it was the evident intention of the legislature to prohibit the use of guns of larger caliber for the purpose of killing game or other animals, and, in a prosecution under such a statute, it is not sufficient to follow its literal terms in charging the offense, but the particular kind of use which the legislature intended to prohibit must be alleged; and a complaint charging the willful and unlawful use of a No. 8 shotgun merely in the language of the statute, is insufficient to show a complete offense, or to give a justice of the peace jurisdiction, and a defendant convicted under such complaint, must be discharged on *habeas corpus*.

WRIT of *habeas corpus* from the Supreme Court to the sheriff of Fresno County to test the validity of a judgment of the Justice's Court of the Third Judicial Township of Fresno County. S. C. St. John, Justice of the Peace.

The facts are stated in the opinion of the court.

V. G. Frost, for Petitioner.

THE COURT.—The prisoner was convicted and is imprisoned upon a charge that he "did willfully and unlawfully use a shotgun of a larger caliber than that commonly known and designated as a No. 10 gauge, to wit, a No. 8 gauge." This is in the language of the statute defining the offense (Pen. Code, sec. 627, as amended March 9, 1897; Stats. 1897, p. 92), but still it does not sufficiently charge the offense, because the statute contains a qualification which it does not express. The legislature did not mean to make it a misdemeanor to use a No. 8 gun in any possible or conceivable way, or for any possible purpose. Taking the whole context of the act, it is apparent that the intention was to prohibit the use of guns of large caliber for the purpose of killing game or other animals. It is like the law prohibiting

the drawing of blood in the street, which was properly held not to apply to the bleeding by a barber of a man who fell down in a fit. In a prosecution under such a statute it is not sufficient to follow its literal terms in charging the offense, but the particular kind of use which the legislature intended to prohibit must be alleged. The charge, in other words, must be laid according to the true construction of the act, and must contain all the elements of the complete offense.

As the complaint did not state facts sufficient to constitute an offense, the justice had no jurisdiction and the prisoner must be discharged.

So ordered.

Garoutte, J., did not participate.

[L. A. No. 269. Department One.—January 14, 1898.]

In the Matter of the Estate of JOAQUIN FERNANDEZ, Appellant. COMMERCIAL BANK OF SAN LUIS OBISPO, Appellant, v. M. F. BURKE, Administrator, Respondent.

ESTATES OF DECEASED PERSONS—PAYMENT OF CLAIMS WITHOUT ORDER OF COURT—INSOLVENCY OF ESTATE—SETTLEMENT OF ANNUAL ACCOUNTS—APPEALABLE ORDER—CONCLUSIVENESS UPON UNPAID CREDITORS—FINAL ACCOUNT.—Though it is the proper practice for the administrator to obtain an order for the payment of general creditors, and without such order payments are made at his peril; yet where the payment of such claims is credited in his annual accounts, and such accounts are allowed and settled by the court, the order allowing them is not void, but is an appealable order, which, however ill-allowed or erroneous, becomes conclusive upon unpaid creditors who do not appeal therefrom; and the fact that an apparently solvent estate appears to be insolvent, upon settlement of the final account of the administrator, cannot authorize an attack by an unpaid creditor upon the items of payments to creditors allowed in the previous annual accounts of the administrator.

ID.—FAMILY ALLOWANCE—ORDER PRIOR TO INVENTORY—ALLOWANCE OF PAYMENTS AFTER INVENTORY.—Payments made on account of family allowance after the filing of the inventory, without further or other order of the court than that made for such payments until the filing of the inventory, or until further order of the court, which were settled and allowed in the annual accounts, without

appeal therefrom, cannot be objected to upon settlement of the final account because of the final insolvency of the estate; and a payment made by the administrator thereon after the last settlement of an annual account, in good faith, at a time when the estate was not known to be insolvent, and when the family was without other means of support, may be properly allowed by the court in the settlement of the final account.

ID.—COMMISSIONS OF ADMINISTRATOR—REAL ESTATE SOLD UNDER DEED OF TRUST.—The commissions of the administrator are to be allowed upon the amount of the estate accounted for by him; but the valuation in the inventory is not conclusive evidence of such amount, and where real estate, inventoried at much more than the amount of a deed of trust, was sold under the deed of trust, the administrator cannot be allowed commissions upon its appraised value in the inventory, or upon any greater amount than the sum for which the property was actually sold.

ID.—CARRYING ON OF BUSINESS—CARE OF ANIMALS—ALLOWANCE OF EXPENSE.—The expense of the proper caring by the administrator of sheep, lambs, cattle, hogs, horses, and colts, until they were sold, is not such carrying on of the business of the decedent as will make the administrator liable for loss and expense to the estate incurred on account thereof; but it was the duty of the administrator to care for them until they could be advantageously sold; and where the court found that the administrator managed the estate in a business-like manner, and used every necessary and prudent measure to protect it, he was properly allowed in his final account the expenses incurred in the care of such animals, notwithstanding the final insolvency of the estate.

APPEAL from an order of the Superior Court of Santa Barbara County settling the final account of an administrator. W. B. Cope, Judge.

The facts are stated in the opinion of the court.

Paul R. Wright, and W. I. Day, for Appellant.

Thomas McNulta, and Grant Jackson, for Respondent.

THE COURT.—The Commercial Bank of San Luis Obispo, a creditor of the estate of said decedent, filed exceptions to the final account of M. F. Burke, the administrator of said estate, and its exceptions having been disallowed, and the said account having been settled and approved, said bank appeals.

The inventory of said estate was filed May 22, 1893, showing the assets to be of the value of \$59,986.50, and the total of the claims proved and allowed was \$36,526.52, showing a balance

over indebtedness of \$23,459.98. The claim of appellant amounted to \$19,821, and was unsecured. The only other large claim was that of the San Francisco Savings Union, for \$15,643.33, which was secured by a deed of trust. The aggregate of all the other claims—nine in number—was \$1,052.19.

The administrator filed his first annual account June 12, 1894, and his second annual account May 11, 1895, the third account being the final one, to which appellant excepted. Said first and second annual accounts were each, after due notice and hearing, approved and allowed by the court by orders duly made. No exceptions were filed or objections made to either of said accounts.

In said first annual account the payments of all said smaller audited claims were reported paid in full. The only payment to appellant was made October 14, 1895, and reported in the final account, viz., \$2,500.

The final account, as filed, contained the item, "Cash, administrator's commissions, \$841.97," and showed a balance in his hands of \$753.69. On the hearing of the final account, the court increased said commissions to \$1,920, and allowed attorneys' fees in the sum of \$400, and found the estate indebted to the administrator in the sum of \$799.34, and ordered that upon filing vouchers for said attorneys' fees he, and the sureties on his bond, should be discharged. The estate, therefore, proved to be insolvent, all of appellant's claim except the sum of \$2,500 being unpaid.

1. Appellant's first point is, that the payment of general debts, proved and allowed, amounting to \$857.19, was illegal, having been made without any order of the court, and that the order of the court allowing and approving said first annual account was "void" as to those items.

This contention is based by appellant upon section 1646 of the Code of Civil Procedure, which, after providing for the payment of funeral expenses and expenses of last sickness, provides: "He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this article, the payment has been ordered by the court."

It is undoubtedly the proper practice to obtain an order for

the payment of general creditors, and without such order payments are made at the peril of the administrator. If exceptions had been filed to the first account, and it appeared then that the sufficiency of the assets for the payment of all the debts was doubtful, it would have been the duty of the court to have stricken them out, with leave to charge them in a future account if the estate should prove solvent, or to the extent of their *pro rata* share if the estate should prove insolvent; but certainly it cannot be said that the action of the court in approving these payments and allowing them as a credit to the administrator was "void," for to say that such action of the court is void is to say that the court has no power to allow a payment not based upon a previous order to pay it, even though the estate could pay all its debts were they many times larger.

Unless the order approving the account must be held absolutely void, appellant is concluded thereby, whether the order was erroneous or not. It was an appealable order. (Code Civ. Proc., sec. 963, subd. 3.)

The settlement of said annual accounts not having been appealed from is conclusive. (Code Civ. Proc., sec. 1637; *Estate of Stott*, 52 Cal. 403; *In re Coutts*, 87 Cal. 480; 100 Cal. 404; *Washington v. Black*, 83 Cal. 294.)

The question before us did not arise in *Estate of Dunne*, 65 Cal. 378, cited by appellant. That was a petition for a partial distribution. In the opinion, after saying that the executor or administrator shall be allowed credits for funeral expenses, etc., though no previous order had been made directing the payment, it was further said: "But that he shall not have authority to pay, nor be allowed at any accounting, any other debt or legacy unless the court has expressly ordered the same to be paid."

No authority is cited for that dictum, nor has it been cited or followed in any subsequent case; but in *Miller v. Lux*, 100 Cal. 615, where large sums of money had been paid to the widow, and intended as a family allowance, but without being authorized by an order of the court, it was said that such payments were made at the peril of the executors, "and, to the extent that they were not approved by the subsequent order of the court, constituted a wrongful use of the money of the estate." And in the opinion rendered upon a petition for rehearing it was said:

"If the court upon the new hearing find \$1,000 per month, or any greater or less amount, a reasonable sum to be applied for the support of the widow, then the executors should be credited with the amount so found to be reasonable and proper." We think this authority fully supports the conclusion that, though these debts were paid without any order or direction of the court, the court had power to allow them as credits upon the settlement of the annual account, and though ill-advised or erroneous, no appeal having been taken from the order approving that account, appellant is concluded thereby.

2. Before the inventory was filed the court made an order directing the administrator to pay to the widow \$100 per month, for family support, until the inventory should be filed or until the further order of the court. This allowance was paid for twenty months, amounting to \$2,000. No other than the original order was made directing its payment. Appellant excepted to all of said payments except the first, contending that \$1,900 was paid without authority.

Fourteen hundred dollars of the \$2,000 was included in the first annual account, \$500 in the second, and \$100 in the final account, the last payment having been made June 1, 1895, less than a month after filing of the second annual account, and before it was approved.

So far as the exceptions to these payments is based upon the absence of a prior order of the court directing them, they must be held not well taken, upon the authority of *Miller v. Lux*, *supra*; and as to all, except the last payment of \$100, they were settled and allowed in the annual accounts, to which no exceptions were taken, and which were not appealed from, and cannot now be reviewed. It is said, however, that the final account shows the estate to be insolvent. Conceding that, it could only affect the last payment, which was made June 1, 1895; and it does not appear that at that date there was reason to suppose the estate would prove to be insolvent. The administrator testified that he supposed the order for the payment of the family allowance continued, and was so advised by counsel; that the family was without the means of subsistence, and that at all times during which these payments were made the estate was solvent. There was no cross-examination of the witness, nor was

any evidence offered by appellant other than the annual accounts.

It is further urged against the allowance of said payments for family support that a homestead and certain personal property were set off to the widow. That fact appears only in the administrator's report attached to his final account; but of what the homestead and personal property consisted, or when set off, does not appear. The exception to said payment cannot be sustained.

3. It is contended that the commissions allowed the administrator greatly exceed those allowed by law.

In his final account the administrator credited himself with the sum of \$841.97, as commissions. Upon the hearing the commissions were increased by the court to \$1,920, and this increase is excepted to. It is stated in appellant's brief that the \$841.97 commissions, appearing in the account as filed, were computed upon the amount of money received and accounted for, not including the value of the real estate; and it is assumed by counsel on both sides that the additional allowance was based upon the real estate. The administrator is entitled to commissions "upon the amount of the estate accounted for by him." (Code Civ. Proc., sec. 1618.) For the purpose of ascertaining the amount of the estate, the inventory and appraisalment may be looked at, but, as was said in *Estate of Simmons*, 43 Cal. 549: "It does not follow, however, in any case that the appraisalment on file is necessarily to constitute the basis upon which the compensation is to be allowed;" and in *Estate of Hinckley*, 58 Cal. 516, it was said: "The valuation of the inventory is evidently not intended to be conclusive for any purpose." The administrator is chargeable in his account with the whole estate of the decedent which may come into his possession, "at the value of the appraisalment contained in the inventory" (Code Civ. Proc. sec. 1613); but, if any is sold for less than the appraisalment, he is not responsible for the loss, if the sale has been advantageously made. (Code Civ. Proc., sec. 1614.) "The inventory may or may not afford a basis of calculation for the purpose of allowance of commissions upon property taken into possession and accounted for; but, if resorted to in making such allowance, it cannot in any case amount to more than *prima facie* evidence of value, and the value should be left open to inquiry, if the inven-

toried value be not satisfactory to all parties concerned." (*Estate of Simmons, supra.*) If the administrator takes possession of the estate, and it is distributed to the heirs, it is thereby "accounted for" by him, and, if no objection is made by them to the valuation in the inventory, that would form the basis of estimating his commissions. If the administrator sells the estate, or a portion of it, the amount received upon such sale becomes the evidence of its value to the estate, for which he has to account and upon which his commissions are to be estimated.

In the present case, it does not appear from the record that the administrator made any disposition of the real estate for which the commissions were allowed, but it is assumed in the briefs that it was sold under the power contained in the deed of trust, made by the decedent for the amount of the indebtedness to the San Francisco Savings Union for which the property was held in trust, and that that was the full value of the property at the time of the sale. If the administrator had sold the property under an order of court for the purpose of paying this debt of the decedent, he would have been entitled to commissions only upon the amount for which it was sold, and he cannot be entitled to any greater sum by reason of its having been sold by the trustees without any intervention on his part. The real estate with the improvements was appraised at the value of \$37,020, and the claim of the San Francisco Savings Union, which is secured thereby, was approved for the sum of \$15,643.33; but the record does not show the amount for which the real estate was sold in satisfaction of this claim, and we, therefore, are unable to direct a correction of the degree.

4. It is further urged that the administrator had no right to carry on the business at a loss, and should make good to the estate all such loss as was incurred.

There is in the record no evidence that he carried on the business of the intestate in any sense other than that he cared for the personal property until it could be advantageously sold. There were nearly 9,000 head of sheep and lambs, 140 head of cattle, 186 hogs, and 33 horses and colts. These were cared for until they were sold, as it was the duty of the administrator to do; and the court found and stated in its order that the administra-

tor had managed the estate in a good and business-like manner, and used every necessary and prudent measure to protect it.

The superior court is directed to modify its order allowing commissions to the administrator in accordance with the views herein expressed, and, so modified, the orders appealed from will stand affirmed.

[Sac. No. 360. Department One.—January 15, 1898.]

DEXTER TUTTLE, Appellant, v. GEORGE F. SCOTT, and
E. F. PEART, Defendants. GEORGE F. SCOTT, Re-
spondent.

VACATING JUDGMENT BY DEFAULT—AFFIDAVIT OF MERITS—DISCHARGE IN INSOLVENCY NOT A TECHNICAL DEFENSE.—A discharge in bankruptcy or insolvency, disclosed in an affidavit of merits upon motion to vacate a judgment by default, upon the ground of excusable neglect, is not a technical defense rendering the affidavit of merits insufficient, but, like payment or release, is a plea in bar which goes to the merits of the action, and is a defense recognized by the statute, which, when properly interposed, is effectual and conclusive; and, where the showing of excusable neglect is sufficient to justify an order vacating the judgment to let in such defense, the order must be affirmed.

ID. — NECESSITY OF PLEADING DISCHARGE FROM DEBT — RELIEF FROM JUDGMENT.—The necessity of pleading a discharge from the debt sued upon in insolvency or bankruptcy, in order to prevent being bound by the judgment, does not preclude the granting of relief against the judgment, under section 473 of the Code of Civil Procedure, but the existence of the rule that a defense must be pleaded created the necessity for the enactment of that section, in order that parties bringing themselves within its provisions might be so relieved.

ID.—EXCUSABLE NEGLIGENCE—RELIANCE UPON ADVICE OF COUNSEL.—Reliance of an insolvent debtor upon the advice of counsel as to the effect of his adjudication in insolvency, which led the insolvent to believe that the efforts of plaintiff to collect his claim as against the insolvent must be confined to the insolvent court, and to such dividends as he had there received, and which led him to pay no attention to a joint action against the defendant and another maker of the note in suit, is a sufficient excuse for his neglect to answer before judgment to justify the opening of a judgment by default to let in the defense of his discharge in insolvency.

APPEAL from an order of the Superior Court of Colusa County vacating a judgment entered upon default. E. A. Bridgford, Judge.

The excuse for neglect set forth in the affidavit of merits consisted in reliance upon the advice of his counsel that the effect of his adjudication in insolvency would be that none of his creditors could prosecute any action against him, but that all their efforts in reference to the collection of their respective claims against the affiant would be confined to the insolvent court, except such claims as were not affected by the Insolvent Act, and upon the advice of said counsel that said claim of plaintiff was affected by said Insolvent Act, and that, relying upon such advice and knowing that plaintiff had proved his claim and received his proportionate share of dividends from the estate of affiant as an insolvent debtor, he paid no attention to said action. Further facts are stated in the opinion of the court.

Ernest Weyand, and E. T. Crane, for Appellant.

U. W. Brown, and W. G. Dyas, for Respondent.

HAYNES, C.—Appeal from an order vacating a judgment entered upon default. The above-entitled action was brought in the superior court of Colusa county on October 3, 1895, to recover from the defendants the sum of sixteen hundred dollars on a promissory note. On October 21, 1895, upon petition of his creditors, Scott was adjudged an insolvent debtor. On October 26th, the plaintiff presented and proved his claim—consisting of said note—against the estate of said insolvent, and in February following received a dividend thereon of four hundred and thirty-nine dollars and seventy cents. Scott received his final discharge as an insolvent debtor on March 9, 1896. On July 10, 1896, the plaintiff in this action entered the default of both defendants and took judgment against both for the amount of said promissory note less the dividend above mentioned. Within six months thereafter, defendant Scott moved the court to set aside said judgment, as against himself, and for leave to answer, and in support thereof filed an affidavit excusing the default, and the usual statement, upon advice of counsel, that he had a good and substantial defense to said action upon the merits. The affidavit then proceeded to state the facts constituting his defense, viz., the said proceedings and discharge in insolvency, that plaintiff's claim was provable under the Insolvent Act of 1895, and was proved therein, and dividends paid thereon to the plaintiff prior to the entry of said judgment.

Appellant does not question, in his brief, the sufficiency of respondent's excuse for not answering before his default was entered. That it was sufficient, see *Douglass v. Todd*, 96 Cal. 655; 31 Am. St. Rep. 247. As said by the learned counsel for appellant, in his reply brief, "the gist of the question before us is whether the affidavit shows a meritorious defense."

It is not essential that the affidavit of merits should disclose the facts constituting the defense (*Francis v. Cox*, 33 Cal. 323), but, of course, where the facts claimed to constitute the defense are stated, and it appears therefrom that the defense sought to be made is technical, or would not, if fully pleaded, constitute a defense to the action upon the merits, the affidavit is insufficient.

Appellant concedes that, if respondent had pleaded his discharge before the default and judgment were entered, it would have been good as a plea in bar, but nevertheless contends that it is merely a technical defense.

This contention cannot be sustained. A discharge in bankruptcy or insolvency, like payment or release, is a plea in bar which always goes "to the merits or grounds of the action." The defense is one clearly recognized by the statute, and, when properly interposed, is effectual and conclusive.

Appellant cites *Nevada Bank v. Dresbach*, 63 Cal. 324, in support of his contention. The question there was disposed of in a line, the court saying: "On the motion to vacate the judgment there was no affidavit of merits." In the reporter's statement of facts it was said: "The motion was supported by affidavits, but there was no affidavit of merits apart from the statements made in relation to the proceedings and discharge in insolvency."

It is not necessary to discuss that case. The meager statement of facts, as well as the very brief statement of the court in deciding the point, precludes any intelligent comment upon the particular defect of the affidavit. It should be noticed, however, that the affidavits did disclose that the defendants had been discharged in insolvency, and the court did not decide that the judgment could not be vacated for the purpose of permitting them to plead their discharge in bar of the action, and that case does not, therefore, sustain appellant's proposition that a default will not be set aside to permit such plea. In the case before us, there is a perfect affidavit of merits, aside from the further statement of the proceedings and discharge in insol-

vency, and therefore the naked question is presented whether a default, properly excused, should be set aside to permit such plea.

In *Rahm v. Minis*, 40 Cal. 421, a judgment was entered against Rahm after his discharge in insolvency, and suit was prosecuted by him to enjoin the defendant, Minis, as sheriff, from levying an execution issued on such judgment. The court held that he might have moved for relief from the judgment under section 68 of the practice act (section 473 of the Code of Civil Procedure), if he could show that the judgment was taken against him through his mistake, surprise, or excusable neglect, and "he might then have set up his defense to the action"; and, having a complete remedy at law, he was not entitled to relief in equity.

In *Dimock v. Revere Copper Co.*, 117 U. S. 565, it was said: "So here, if Dimock had brought his discharge to the attention of the superior court at any time before judgment, it would have been received as a bar to the action, and, under proper circumstances, even after judgment, it might be made the foundation for setting it aside and admitting the defense." To the same effect is *Golden v. Blaskopf*, 126 Mass. 523, opinion by Gray, C. J.; citing *Todd v. Barton*, 117 Mass. 291, and *Shurtleff v. Thompson*, 63 Me. 118.

There is no question as to the general rule that a discharge in insolvency or bankruptcy, like any other defense to an action, must be pleaded, and if the defendant omits to plead it he is bound by the judgment. But the existence of that rule created the necessity for the enactment of section 473 of the Code of Civil Procedure in order that parties bringing themselves within its provisions might be relieved, and that respondent brought himself within its provisions is beyond question.

The order appeal from should be affirmed.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

Harrison, J., Garoutte, J., Van Fleet, J.

[S. F. No. 455. Department One.—January 15, 1898.]

J. H. FLICKINGER et al., Appellants, v. CHARLES W. FAY,
Respondent.

STREET IMPROVEMENT—ACCEPTANCE OF STREET—JURISDICTION OF CITY COUNCIL—PUBLIC EXPENSE—CONSTRUCTION OF STATUTE—MODE OF PROCEDURE.—Notwithstanding the acceptance of a street, the city council still retains jurisdiction, under the street improvement act of March 18, 1885, to order its improvement, and the provision in section 20 of that act, requiring the municipality to improve such street at the public expense, is subordinate to the provision in section 2 of the same act, that the city may order such improvement whenever the public interest or convenience may require, and also to the provision in section 1 that when such order is made the work must be done under the proceedings prescribed in the act, and the contract for doing the work must be let to the lowest responsible bidder, after proposals have been invited under the provisions of section 5 of the act.

ID.—AWARD OF CONTRACT—INJUNCTION—REMEDY FOR ILLEGAL ASSESSMENT.—The city council having jurisdiction to award a contract for the improvement of an accepted street, the contractor to whom it is awarded cannot be enjoined, at the instance of owners of property fronting on the street, from performing the contract, upon the ground that by reason of the acceptance of the street, the cost of the improvement should be borne at the public expense, and not assessed upon adjacent lands; but such question is to be determined after the work under the contract is completed, when, if an assessment is attempted and cannot be legally made, an appropriate remedy may be had to defeat it.

APPEAL from a judgment of the Superior Court of Santa Clara County. John Reynolds, Judge.

The facts are stated in the opinion of the court.

Joseph R. Patton, and Hiram D. Tuttle, for Appellants.

C. T. Bird, for Respondent.

HARRISON, J.—The mayor and common council of the city of San Jose passed a resolution August 26, 1895, of their intention to order certain improvement of Santa Clara street between Third and Eleventh streets, in said city, and this resolution having been posted and published as required by law, subsequently passed a resolution ordering the work to be done. Under proceedings regularly taken therefor, a contract for doing the work was afterward entered into on behalf of the city with

the respondent. After the respondent had commenced work under this contract, the plaintiffs, who are owners of property fronting upon that portion of Santa Clara street, commenced the present action to restrain him from its further prosecution. In their complaint they allege that in the year 1888 this portion of Santa Clara street was improved, under contracts entered into therefor with the city authorities under proceedings taken by virtue of the provisions of the street improvement act of March 18, 1885, and that thereafter the city duly adopted resolutions by which it accepted this portion of Santa Clara street, and agreed that it would thereafter keep the roadway thereof open and in repair, and that the expense of so doing should be paid out of the street contingent fund; that by reason thereof the city authorities had no jurisdiction to order an improvement of the street by which the cost should be imposed upon the adjacent lands. The defendant answered the complaint, and, the cause having been tried by the court, judgment was rendered in his favor and dissolving an injunction previously granted. The plaintiffs have appealed from this judgment upon the judgment-roll alone.

The court found that the street had been improved in the year 1888, as alleged in the complaint, but that the contract for said improvement had not been completed within the period fixed therein for its completion, and that by reason thereof the assessments issued for the expense of the work were void, and that therefore the ordinances subsequently adopted purporting to accept the street were null and void.

Section 20 of the street improvement act (Stats. 1885, p. 160) provides: "Whenever any street or portion of a street has been or shall hereafter be fully constructed to the satisfaction of the superintendent of streets and of the city council, and is in good condition throughout," the same shall be accepted by the city council and thereafter kept in repair and improved by the city at the public expense. The authority here given to the city council to accept the street is conditioned merely upon the street having been "fully constructed" as therein specified. Whether the work of such construction was done by the owners of the adjacent land at their own expense, or under a contract with the city; whether such contract was valid or not, or was so performed as to entitle the contractor to an assessment therefor; or whether

the owners of the land assessed paid the assessment without objection, or successfully contested its enforcement, are matters immaterial to the validity of such acceptance of the street. If the street has been in fact fully constructed to the satisfaction of the superintendent of streets and of the city council, and is in good condition throughout, the duty is placed upon the city council to accept the same, and after such acceptance to keep it in repair at the public expense.

Notwithstanding the acceptance of a street, the city council still retains jurisdiction to order its improvement, and the provision in section 20 of the act aforesaid, requiring the municipality to improve such street at the public expense, is subordinate to the provision in section 2 of the same act that the city council may order such improvement "whenever the public interest or convenience may require," and also to the provision in section 1 that when such order is made the work must be done under the proceedings described in the act. (*Santa Cruz etc. Co. v. Broderick*, 113 Cal. 628.) It was held in the case just cited that the board of supervisors had no power to direct the superintendent to enter into a contract for doing such work, unless it was awarded to the lowest responsible bidder after proposals had been invited under the provisions of section 5. It necessarily follows from the principles of this case that, as the city council had the power to award to the respondent a contract for doing the work, he could not be enjoined at the instance of the plaintiffs from performing the contract upon the ground that by reason of the acceptance of the street the cost of the improvement was to be borne at the public expense. The contract between the defendant and the city was legally entered into, and it is not alleged that the work to be done by him thereunder will injuriously affect the plaintiffs. Whether the cost of that work shall be borne by the city, or be assessed upon the adjacent lands, will be determined after the work under the contract has been completed. If, for any reason, an assessment therefor cannot be legally made upon the lands of the plaintiffs, they will then be entitled to relief against such procedure, or can successfully defend any proceeding to enforce the assessment.

The judgment is affirmed.

Garoutte, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

[Crim. No. 292. Department One.—January 15, 1898.]

THE PEOPLE, Respondent, v. ANNIE ELLIOTT, alias Annie Parker, Appellant.

CRIMINAL LAW—ENTICING GIRL INTO HOUSE OF PROSTITUTION—PREVIOUS CHASTE CHARACTER—CONFLICT OF EVIDENCE—QUESTION FOR JURY.—Where the evidence for the prosecution was sufficient to show that the defendant enticed a young unmarried girl, twelve years old, of previous chaste character into a house of prostitution kept by the defendant, for the purpose of prostitution, any conflicting evidence as to her previous chaste character simply raises a question for the jury.

ID.—OPINION EVIDENCE OF WITNESS—ORDER STRIKING OUT.—It is not error to strike out answers of a witness as to what he judged from what he saw.

ID. — ERRONEOUS ADMISSION OF EVIDENCE — ENTICEMENT OF OTHER GIRLS.—The evidence of other young girls that the defendant had asked each of them to her house to have illicit intercourse with men, is inadmissible; and the admission of such evidence for the prosecution is prejudicially erroneous, and requires the reversal of a judgment of conviction.

INSTRUCTIONS—REPETITION UNNECESSARY.—Instructions given in substance need not be repeated at request of the defendant.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. A. C. Hinkson, Judge.

The facts are stated in the opinion of the court.

Charles T. Hughes, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

THE COURT.—An information filed against the defendant charged that in May, 1896, she did "willfully, unlawfully, and feloniously inveigle and entice into a certain house in Sacramento city, county of Sacramento, state of California, one Daisy McCarty, who then and there was an unmarried female of previous chaste character and under the age of eighteen years, to wit, of the age of twelve years, for the purpose of prostitution and to have illicit carnal connection with men."

The case was tried and defendant found guilty. She moved for a new trial, which was denied, and thereupon judgment

was entered that she be punished by imprisonment in the state prison at San Quentin for the term of five years and pay a fine of one thousand dollars. From that judgment and the order denying her motion for a new trial she has appealed.

The statute, section 266 of the Penal Code, provides: "Every person who inveigles or entices any unmarried female, of previous chaste character, under the age of eighteen years, into any house of ill-fame or of assignation, or elsewhere, for the purpose of prostitution, or to have illicit carnal connection with any man," is punishable, etc.

The evidence introduced by the prosecution was quite sufficient to show that Daisy McCarty was unmarried, was of previous chaste character, was only twelve years old, and was enticed by defendant into her own house for the purpose of having illicit carnal connection with men, and did have such connection. It is true there was a conflict in the evidence as to her previous chaste character, but that was a question for the jury, who saw and heard all the witnesses. There was no error in striking out the answers of the witness Wagner as to what he judged from what he saw.

Three other young girls were called as witnesses by the prosecution, and, over the objection of defendant, were permitted to testify that defendant had asked each of them to go to her house to have illicit intercourse with men.

This character of evidence was erroneously admitted. (*People v. Stewart*, 85 Cal. 174.) While there are exceptions to the general rule excluding evidence as to other offenses, this case is not within those exceptions. It comes squarely within the rule.

The instructions given by the court covered the whole case, and stated the law correctly. There was no error in refusing to give certain instructions asked by defendant, as the law stated therein was substantially and in effect given in other instructions. The rule is well settled that instructions given in substance need not be repeated. (*People v. Madden*, 76 Cal. 521; *People v. Doane*, 77 Cal. 560; *People v. O'Brien*, 78 Cal. 41; *People v. Adams*, 85 Cal. 232.)

The judgment and order are reversed, and cause remanded for a new trial.

[Crim. No. 315. Department One.—January 15, 1898.]

THE PEOPLE, Appellant, v. E. J. BRYANT, Respondent.

CRIMINAL LAW—OBTAINING MONEY UNDER FALSE PRETENSES—ASSIGNMENT OF NOTE AND MORTGAGE—MISREPRESENTATIONS AS TO MORTGAGED PROPERTY—RESPONSIBILITY OF MAKER OF NOTE—SUFFICIENCY OF INDICTMENT. — An indictment charging the defendant with the obtaining of money under false pretenses, from the purchaser of a note and mortgage, sold by the defendant with intent to cheat and defraud such purchaser of her money, and under the false and fraudulent representation that the mortgaged land was good tillable land, of good soil, and of great value, and sufficient as security for the payment of the note, and the false and fraudulent pointing out of lots of land of that character which were not included in the mortgage, whereby the purchaser, having no knowledge of the facts, and believing the truth of such pretenses, was induced to make the said purchase and part with her money therefor to the defendant, whereas in truth and in fact the lots described in the mortgage were not good or tillable land or of any value, or sufficient as security for the payment of any sum whatever, and were not the lots so pointed out, as defendant then and there well knew, etc., sufficiently states an offense, and it is error to sustain a demurrer to such indictment, upon the ground that it does not state that the maker of the note was unable to pay the same, or that it has not been paid.

ID.—PROPERTY OBTAINED BY FRAUDULENT PRETENSES NEED NOT BE LOST. If a person is induced to part with property by reason of fraudulent pretenses and misrepresentations, he is thereby defrauded of the property so parted with, even though he may eventually make himself whole in some mode not then contemplated; and it is not necessary to show that the property has been absolutely lost to him, or that he cannot recover its value in a civil action, in order to sustain the charge.

ID.—FALSE REPRESENTATIONS INDUCING PAYMENT OF MONEY.—Whether the false and fraudulent representations made by the defendant did in fact induce the purchaser of the note and mortgage to part with her money is one of the elements of the charge to be established at the trial; but if established to the satisfaction of the jury, and shown to have been false and fraudulent, and made by the defendant knowingly and designedly, she was defrauded of her property by the defendant by means of these representations.

APPEAL from a judgment of the Superior Court of Los Angeles County. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Appellant.

A. B. McCutchen, and Ben Goodrich, for Respondent.

HARRISON, J.—The superior court sustained a demurrer to the indictment filed herein against the defendant for obtaining money under false pretenses, and the people have appealed from the judgment entered thereon. It is charged in the indictment that the defendant, intending and designing to cheat and defraud one Harriet E. Hoxie of her money and property, proposed and offered to sell and assign to her a promissory note for the sum of five hundred dollars, theretofore made to him by one Emma A. Lewis, together with a mortgage, securing its payment, the said mortgage being upon lots 1 and 2, block No. 41 of the Rancho Providencia and Scott tract, and did then and there willfully, knowingly, falsely, fraudulently, and designedly represent and pretend to the said Harriet E. Hoxie that the land covered by said mortgage was good, tillable land, of good soil and of great value, and fully sufficient as security for the payment of the sum of money mentioned in said promissory note, and did point out and exhibit to her certain lots of land other than those described in the mortgage, which were in fact good and tillable land and valuable and sufficient as security for said payment, and did willfully, knowingly, designedly, falsely, and fraudulently represent and pretend to her that these last pieces of land, so pointed out by him, were the ones described in said mortgage; that the said Harriet E. Hoxie had no knowledge or information of the location of the lots described in said mortgage, or of their character, value, or condition, and that she believed the representations and pretenses so made to her by the defendant, and relied upon the same, and was induced thereby to and did buy the said promissory note and mortgage, and paid to the defendant therefor the sum of five hundred dollars, her own property and money; whereas, in truth and in fact, the lots described in said mortgage were not good or tillable land or of any value or sufficient as security for the payment of any sum of money whatsoever, as the said defendant then and there well knew; and, whereas the lots pointed out and represented by him to the said Harriet E. Hoxie to be the lots described in said mortgage were not the lots described in said mortgage, as the defendant then and there well knew, and that each and all and every of the said pretenses and representations made by the defendant to the said Harriet E. Hoxie were false, fraudulent, and untrue to the then knowledge of the said defendant.

Section 532 of the Penal Code provides: "Every person who knowingly and designedly, by false or fraudulent representations or pretenses, defrauds any other person of money or property . . . is punishable in the same manner and to the same extent as for larceny of the money or property so obtained." It is contended in support of the demurrer to the indictment that an offense against this provision of the section is not committed unless it appears that the person to whom the representations were made has been deprived of his property by reason of the fraud committed against him; that as the fraudulent representations charged in this indictment related solely to the property described in the mortgage, and as the mortgage is only a security for the payment of the promissory note, and as it is not charged that the maker of the note is unable to pay the same, or that it has not been paid, the indictment fails to show that she has been defrauded of any of her property. We cannot concur in this construction of the statute. If a person is induced to part with his property by reason of fraudulent pretenses and misrepresentations, he is thereby defrauded of the property so parted with even though he may eventually make himself whole in some mode not then contemplated. It is not necessary to show that the property has been absolutely lost to him in order to sustain the charge. He is defrauded of his property when he is induced to part with it by reason of the false and fraudulent pretenses and representations, and the offense is complete when by means of such false pretenses the fraud thereby intended is consummated by obtaining possession of the property sought. The man who falsely pretends to be the owner of certain specified property, and by reason of such pretense fraudulently obtains the property of another, is guilty of obtaining that property by false pretenses, notwithstanding the defrauded party may recover the value of the property in a civil action against him. "If the false pretense was among the means by which he obtained the valuable thing, he has committed the full crime the same as though no other influence combined therewith." (2 Bishop's Criminal Law, sec. 424.) In *Clark v. People*, 2 Lans.329, where the defendant was charged in the indictment with obtaining property upon the security of his promissory note through false and fraudulent representations as to his ability to pay the same, the court held that it was not

necessary that the indictment should show that the note had not been paid, saying: "The allegation that the property was fraudulently obtained shows that the crime was consummated, and payment of the note after this would not blot out the offense or atone for its commission. It was not material, therefore, to allege that the note was not paid." (See, also, *Skiff v. People*, 2 Park. C. 139; *Commonwealth v. Coe*, 115 Mass. 481.) In *People v. Cook*, 41 Hun, 67, the indictment charged the defendant with having sold to the prosecuting witness, and obtained his money therefor, a promissory note, upon the false representation that the maker of the note was not a certain person of the same name, who lived in the same town, and that the prosecutor, being deceived thereby, was induced to pay his money for the note; and to the objection that the indictment was defective in not alleging that anyone was injured by the pretenses, as it did not charge that the real maker of the note was irresponsible, the court said: "Although there is no allegation that the maker of the note was less responsible than the person represented as the maker, yet it charges that the person to whom the representations were made was induced by the false pretenses to part with his money, and that they were made with intent to cheat and defraud him, and it may be that he was prejudiced. The purpose of the statute is to protect against imposition, and not to permit guilt to depend upon the uncertain determination of the question whether any pecuniary injury resulted in some view which might be taken of the situation. The indictment alleges that the person applied to by the defendant was induced to take the note on the credit of the party who was represented to him as the maker. It cannot be inferred that he would have done so on the credit of the person who had in fact executed the note."

Upon the face of the indictment herein, it is sufficiently charged that the defendant knowingly and designedly, with the intent and design to cheat and defraud Mrs. Hoxie, made certain false and fraudulent representations to her concerning the value of the security for the note, and that she was induced thereby to and did buy the note and mortgage, and paid to him therefor the sum of five hundred dollars. Whether these representations did in fact induce her to part with her money is one of the elements of the charge to be established by the people at the trial (*State v.*

Fooks, 65 Iowa, 196; *Therasson v. People*, 82 N. Y. 238; Wharton's Criminal Law, sec. 1176; Bishop's Criminal Law, sec. 461); but if established to the satisfaction of the jury, and shown to have been false and fraudulent, and made by the defendant knowingly and designedly, she was defrauded of her property by the defendant by means of these representations.

The judgment is reversed, and the superior court is directed to overrule the demurrer to the indictment.

Garoutte, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

[S. F. No. 889. Department One.—January 15, 1898.]

MARY E. DITTRICH, Appellant, v. JESSE GOBEY and ELMIRA GOBEY, Executor and Executrix, etc., Respondents.

CONTRACT BETWEEN DIVORCED PARENTS — CUSTODY OF DAUGHTER BY FATHER—RETURN TO MOTHER AT MAJORITY—LIQUIDATED DAMAGES—VOID STIPULATION. — A contract entered into between divorced parents by the terms of which the custody of a minor daughter, which had been awarded to the mother, was transferred to the father, who agreed to bear the expenses of her support and education until she reached the age of eighteen, and then to return her to her mother, and, in case of violation of any provision of the contract by him, agreed to restore the daughter to her mother free of expense, and for any failure to do so to become liable to the mother in the sum of one thousand dollars as liquidated damages, if construed as importing anything more than an agreement to allow and afford facilities to the daughter to return to the mother at the age of majority, if she chose to do so, and as imposing an unconditional obligation to return her to her mother at the age of eighteen at all events, is to that extent void, and the stipulated damages cannot be recovered for its breach.

Id.—STIPULATION INFRINGING PERSONAL LIBERTY.—The right of freedom from personal constraint is perfect at the age of majority, and no parent has a right to the custody of a child thereafter; and a stipulation to restore a daughter to the custody of a mother at the age of eighteen, *volens volens*, is as much a contract to infringe the personal liberty of the daughter as if the period fixed had been twice or thrice that age, and is unlawful.

Id.—CONTRACT NOT ALTERNATIVE.—A contract in the alternative when not in terms providing otherwise, allows the right of election to the party on whom rests the obligation of performance; and there being nothing in the language of the agreement indicative of a

purpose to allow the father to choose whether he would restore the child or pay a pecuniary mulct instead, and no option to pay the penalty and be rid of the obligation to return the custody of the daughter being permitted by the terms of the agreement, the contract cannot be considered as an alternative one to return the child at her majority to her mother, or to pay her one thousand dollars.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion.

Graves & Graves, and Edward P. Cole, for Appellant.

Pierson & Mitchell, for Respondents.

BRITT, C.—Plaintiff Mary E. Dittrich was formerly the wife of one Frank Gobey; they were divorced by a judgment of the superior court of the city and county of San Francisco rendered in the year 1880, and by the terms of such judgment the custody of their minor daughter, Camille Gobey, was awarded to the wife. On May 10, 1883, said divorced parties entered into a contract in writing providing for the transfer of the custody of said Camille to her father until she should become eighteen years of age. Among numerous other stipulations of such contract it was agreed that said Frank should bear the charge of the child's education and support, traveling and other expenses, "and upon the expiration of the term aforesaid, to wit, when said Camille arrives at the age of eighteen years, return her to her mother, Mary E. Gobey"; also that in case of violation of any provision of the contract, the said Frank "shall restore said Camille to her mother free of expense," and for any failure to do so should be liable to the said Mary in the sum of one thousand dollars, as liquidated damages, and for all expenses of legal proceedings which said Mary might institute to repossess herself of the person of said Camille. The child became eighteen years of age on September 24, 1892; her father offered to allow her to return to her mother, but she expressly refused to go. Said Mary made formal demand on the father for restoration of her daughter; he failed to comply, and afterward died. This is an action against his executor and executrix to recover the sum of one thousand dollars, claimed as the

penalty for breach of said contract. Defendants had judgment in the court below.

In the particular of the contract which gives rise to this dispute, viz., that concerning the restoration of Camille to the plaintiff when the former should reach the age of eighteen years, we doubt whether more is reasonably imported by the instrument than that the father would then afford facilities to the daughter for return to her mother in case she desired to return. If, however, the contract is to be understood as an unconditional agreement on the part of Frank Gobey to return Camille at the age of eighteen years to the plaintiff, then it was to that extent void. For at that age the daughter attained her majority; her right of freedom from personal restraint was then as perfect as it could ever become; and her mother's right to her custody was at an end. (Civ. Code, secs. 25, 43, 204.) A stipulation to 'restore' the daughter, *volens volens*, when she would be eighteen years old was as much a contract to infringe her personal liberty as if the age fixed had been thirty-six or fifty-four years, and was unlawful. (Civ. Code, secs. 43, 1667.)

There is no sufficient ground for the view advanced by plaintiff that the contract was alternative—to return the child at her majority to her mother, or to pay one thousand dollars. A contract in the alternative, when not in terms providing otherwise, allows the right of election to the party on whom rests the obligation of performance (Civ. Code, sec. 1448); and there is no language in the instrument before us indicative of a purpose to allow the father to choose whether he would restore the child, or pay a pecuniary mulct instead. On the contrary the contract is plain to the effect that besides the penalty named, the father should pay the cost of legal proceedings by the mother to regain custody of the daughter; so that obviously no option to pay the penalty and be rid of the obligation was allowed to him. The judgment should be affirmed.

Belcher, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Garoutte, J., Van Fleet, J., Harrison, J.

[L. A. No. 433. Department One.—January 17, 1898.]

R. L. HORTON, Appellant, v. CITY OF LOS ANGELES et al.,
Respondents.

MUNICIPAL CORPORATIONS—PROCEEDINGS TO SELL TELEPHONE FRANCHISE—ABATEMENT—REPEAL OF ACT—SUBSTITUTION OF NEW ACT. Proceedings had for the sale of a telephone franchise by a city council under the act of March 23, 1893, could not be carried to a conclusion after the repeal of that act, and the taking effect of the act of May 12, 1897, which supersedes it; but any proceedings had under the former act became *functus officio* after May 11, 1897, and could not be perfected or completed under the act of 1897.

ID.—INJUNCTION TO RESTRAIN SALE — DISSOLUTION — APPEAL AFTER TAKING EFFECT OF NEW ACT—PRESUMPTION—DISMISSAL — Where an injunction to restrain a sale of a telephone franchise under the act of 1893, was dissolved May 10, 1897, the dissolution left the city council free to act, and, when no appeal was taken until nearly two months after that act had ceased to be a law, it must be presumed that if the council proceeded after May 11, 1897, it proceeded under the new act, and as, in any event, the restoration of the injunction would avail nothing, the appeal from the order dissolving the injunction should be dismissed without prejudice.

APPEAL from an order of the Superior Court of Los Angeles County. Lucien Shaw, Judge.

The facts are stated in the opinion.

R. L. Horton, for Appellant.

William E. Dunn, City Attorney, and Graves, O'Melveny & Shankland, for Respondents.

CHIPMAN, C.—Plaintiff brought this action to restrain defendants from taking any further steps under a notice of sale of a certain telephone franchise. The city council of Los Angeles had invited proposals for the sale of a telephone franchise under the act of March 23, 1893. (Stats. 1893, p. 288.) Under the notice, the tenders or proposals were to be opened on May 10, 1897. On that day plaintiff filed his complaint and obtained a temporary injunction as prayed for. An act of the legislature was passed March 13, 1897 (Stats. 1897, p. 135), repealing all acts inconsistent with it, and this act went into effect May 12, 1897. This act in effect superseded the act of March 23, 1893, and this latter act ceased

to exist after May 11, 1897. Any proceedings taken under the act of 1893 to sell any franchise, contemplated by the act, could not be carried to a conclusion after May 11th, but would become *functus officio* after that day. Proceedings begun under the act of 1893 could not be perfected or completed under the act of 1897. This being the situation, defendants applied at once on May 10th, after the restraining order issued, to have it dissolved, and the court shortened the time for hearing the motion to 9:30 o'clock A. M., May 11th, and at the hearing granted the motion to dissolve the injunction. The result of this order was to leave the city council free to act. What it did in the matter is not disclosed, except by respondents' brief, of which we, of course, cannot take notice. Whatever may be the fact, it is obvious that by deciding the questions now before us no purpose can be subserved; but to do so might lead to the result of suggesting, if not promoting, further litigation in the matter. The notice of appeal was served July 8, 1897, nearly two months after the act of 1897 went into operation, and the act of 1893 had ceased to be law. No order that this court can now make in the premises could possibly avail appellant. If the council granted the franchise on May 11th, it could not help appellant now to restore the temporary injunction. If the council did not act upon the proposals until after May 11th, it would have to proceed and we must presume did proceed under the later act and this injunction would avail nothing. (See *Foster v. Smith*, 115 Cal. 611.)

It is therefore recommended that the appeal be dismissed without prejudice to any of the parties.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the appeal is dismissed without prejudice to any of the parties.

Morrison, J., Van Fleet, J., Garoutte, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[S. F. No. 708. Department Two.—January 17, 1898.]

PACIFIC POSTAL TELEGRAPH CABLE COMPANY, Appellant, v. HENRY P. DALTON, Assessor of Alameda County, Respondent.

COLLECTION OF PERSONAL PROPERTY TAXES BY ASSESSOR — CONSTITUTIONAL LAW—CASE AFFIRMED.—That part of the revenue laws which provides for the payment of taxes on personal property by those who do not own real estate, and for the collection thereof by the assessor at the time of the assessment is constitutional and valid. *Rode v. Siebe*, ante, p. 518, affirmed.

ID.—FRAUDULENT VALUATION BY ASSESSOR—INJUNCTION TO RESTRAIN COLLECTION — SUFFICIENCY OF COMPLAINT. — A complaint which shows a fraudulent assessment of the personal property of the plaintiff by the assessor, at a valuation greatly in excess of its actual value, and greatly above that placed by the assessors on similar property of others, with intent to oppress the plaintiff and to compel plaintiff to bear an excessive share of the burden of taxation, and alleging a tender to the assessor of the just amount of taxes conceded to be due, sufficiently states a cause of action to restrain the assessor from proceeding to collect the taxes assessed, as against a general demurrer, though as against a special demurrer it might have been made more definite and precise to the point that the assessment was not made from mere error of judgment.

APPEAL from a judgment of the Superior Court of Alameda County. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

Lloyd & Wood, for Appellant.

Davis & Hill, for Respondent.

McFARLAND, J.—This action was brought by plaintiff to restrain the defendant, as assessor, from selling certain personal property of the plaintiff for taxes. A general demurrer was interposed to the complaint, upon the ground that the facts stated therein were not sufficient to constitute a cause of action, but there was no special demurrer. The court below sustained the demurrer, refused to allow plaintiff to amend and gave judgment for defendant. Plaintiff appeals from the judgment.

The point made by appellant that the part of the revenue laws which provides for the payment of taxes on personal property by

those who do not own real estate is unconstitutional was decided adversely to appellant's contention in the recent case of *Rode v. Siebe*, ante, p. 518.

But we think that the complaint states a cause of action consisting of the alleged fraudulent assessment of appellant's property at a valuation much greater than its actual value; at least, that the complaint is good in this respect as against a general demurrer. The property assessed consists of certain telegraph lines and instruments situated in Alameda county. The complaint avers the actual value of said property to be a certain amount, and that the respondent assessed said property at greatly excessive and exorbitant rates of value over and above its real value. It is averred that "said valuations were excessive and greatly over and above the valuations placed by said assessor upon similar property." It is then specifically averred that the Western Union Telegraph Company has telegraphic lines located in said county near the property of the appellant, and of greater value; and it is averred with great detail that where the two lines run through different cities, towns, and places in said county, the assessor puts valuation upon the lines of said Western Union Company greatly less than the valuations put upon property of the appellant. After averring the different and unequal assessments of the said two lines of telegraph, it is further averred in the complaint as follows: "And plaintiff further alleges that all and similar of the facts aforesaid were well known to defendant at the time of making the assessment and valuation of the property of the plaintiff as aforesaid; and, notwithstanding the knowledge and information, the defendant did proceed to and did assess and value the property of the plaintiff far beyond its value for taxable purposes and far in excess of the valuation and assessment made by him of like property and used for like purposes by the Western Union Telegraph; and the plaintiff alleges that upon the basis of assessment taken and assumed by defendant for the purpose of assessing the value of the telegraph line of the Western Union Company, it will and does appear that the assessment of the valuation of the property of plaintiff is grossly extravagant and unjust and unreasonable." And with respect to the character of the valuation of appellant's property it is averred: "That the said defendant, in making the valuations aforesaid, and in

assessing said personal property at such valuations, has been guilty of fraudulent conduct and has acted fraudulently and with intent to oppress the plaintiff and compel it to bear more than its just share of the burden of taxation, and that said valuations were excessive and greatly over and above the valuations placed by said assessor upon similar property."

We think that the averments above referred to state sufficient facts to show that the assessment was fraudulent; and, whether or not the complaint could have been attacked by special demurrer, on the ground that the attempted statement was uncertain or imperfect, we do not think that there is an entire failure to state facts constituting a cause of action. And, if the assessment was thus fraudulent, it is clear that the appellant had a right to restrain the assessor from proceeding to collect the taxes. In *County of Los Angeles v. Ballerino*, 99 Cal. 597, this court said: "It is undoubtedly true that a taxpayer may enjoin the collection of a tax founded upon an assessment fraudulently and corruptly made with the intention of discriminating against him, and for the purpose of causing him to pay more than his share of the public taxes. (*Merrill v. Humphrey*, 24 Mich. 170; *Lefferts v. Board of Supervisors*, 21 Wis. 688; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51.)" In that case it was held that the demurrer was properly sustained because the plaintiff there did not show by his complaint that he had paid or tendered the amount of taxes which would have been due from him if his property had been assessed properly; but in the case at bar the plaintiff alleged that he had tendered the amount of taxes that would have been due upon a proper valuation. The difference between the complaint in the *Ballerino* case and that in the case at bar is, that in the former it was averred: "That such exorbitant assessment on this parcel of real property was not from error of judgment on the part of said assessor, but was done from corrupt and fraudulent motives as aforesaid"; but we think that in the case at bar the complaint contains substantially that averment. It is averred in the present case that the fact of the exorbitant valuation was "well known to defendant at the time of making the assessment," and that in making the valuation the defendant acted fraudulently "and with intent to oppress the plaintiff and compel it to bear more than its just share of the burden of taxation"; and

these averments certainly show that the exorbitant assessment was not "from error of judgment on the part of said assessor," but was made with the fraudulent intention of compelling appellant to bear more than its just share of the burden of taxation. The averment might have been more specific and precise to the point that the assessment was not made from mere error of judgment, but it cannot be said that there was a total failure to state the facts which constituted the alleged fraudulent assessment. In *Lefferts v. Board of Supervisors, supra*, where the supreme court of Wisconsin held that the lower court erred in sustaining a demurrer to the complaint, the averments were substantially like those in the case at bar. There the court said: "In deciding upon the sufficiency of the complaint, we expressly confine ourselves to a consideration of the allegations that the town assessors fraudulently made a distinction in the assessment and taxation against the plaintiff, and did this with the intention and design of compelling him to pay more than his just proportion of the taxes. Upon this allegation we have no hesitancy in saying the plaintiff is entitled to the relief demanded in the complaint."

Whether or not the averments of the complaint are true is a question not now before us; but, taking them to be true as alleged in the complaint, as we must do in passing upon the demurrer, we think that the complaint sufficiently states a cause of action.

The judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrer.

Temple, J., and Henshaw, J., concurred.

[L. A. 320. Department One.—January 13, 1898.]

NANNIE T. WESTERFIELD, Appellant, v. EDWARD W. SCRIPPS et al., Respondents.

LIBEL—EVIDENCE—MALICIOUS PURPOSE—REITERATED PUBLICATION AFTER SUIT BROUGHT—PRIVILEGED MATTER.—Where the publishers of a newspaper, sued for libel, have answered, justifying on the ground of the truth of the charge, and also pleading in mitigation that the publication was made in good faith and without actual malice, a publication made after the commencement of the suit which, while not repeating the words, refers specifically to the

terms of the first article, and is in substantial effect a reiteration of its substance, the language relating to the same subject matter and being of a character from which a malicious purpose might be inferred, is admissible upon the question of actual malice; and the fact that the article contained a privileged reference to the commencement of the action, cannot operate to exclude it, there being substantial repetition of libelous matter therein not covered by the privilege.

ID.—KNOWLEDGE OF PUBLISHERS—AVERMENT OF TRUTH—FAILURE OF PROOF—PRESUMPTIVE EVIDENCE—BURDEN OF PROOF.—Testimony on the part of the publishers that the first libelous article published was by the employees of the defendants without their knowledge or consent, is not conclusive upon the question of malice in fact, where there are circumstances from which the jury were at liberty to find against such testimony; and the assertion in the answer of the truth of the statements made in the original publication, without apparent investigation to ascertain their truth, and without any effort to prove them at the trial, is in itself a circumstance which the jury may consider as tending to contradict the testimony on behalf of defendants on the question of malice, and the publication of the second article is also a circumstance tending to contradict such evidence; nor is it incumbent upon plaintiff to show that the publishers had knowledge of such second publication, but the fact of its publication in their paper is presumptive evidence of their knowledge, the burden of overcoming which rested with them.

ID.—EXEMPLARY DAMAGES —APPLICABILITY OF INSTRUCTION. — Where there was evidence upon which the jury were authorized to find that the publication was made with actual malice, an instruction relating to exemplary damages is properly applicable.

ID.—EFFECT OF PLEA OF JUSTIFICATION—QUESTION OF GOOD FAITH—PROPER INSTRUCTION.—An instruction with reference to the defendant's plea of justification, that defendants having alleged their publication to be true, and reasserted the same in their answer, the jury were entitled to consider the good faith or want of good faith in which such answer was made, and that when a defendant republishes a libelous charge by making it a record of the court, he does it at his own risk, and if at the trial he fails to prove its truth, and did not in good faith expect to prove its truth, he intensifies the original wrong, is properly given.

APPEAL from an order of the Superior Court of Los Angeles County granting a new trial. Waldo M. York, Judge.

The main facts are stated in the opinion of the court. The substance of the instruction with reference to the defendant's plea of justification, is stated in the syllabus on that subject.

Henning & Bowen, and Del Valle & Munday, for Appellants.

E. K. Blades, and Edwin A. Meserve, for Respondent.

VAN FLEET, J.—Action for libel in which plaintiff had verdict and judgment. The lower court set the verdict aside and granted a new trial upon the ground, as expressed in its order, “of error of law occurring at the trial consisting in the admission by the court, as evidence, of the publication in the defendants’ paper of October 18, 1895, of an article headed, ‘After the Stuff,’ and relating to plaintiff, and the commencement of this action, and not on the ground of the insufficiency of the evidence to justify the verdict of the jury.”

Plaintiff appeals from the order, contending that the article in question was properly admitted in evidence, and that the order was erroneous.

The article counted upon in the complaint as constituting the libel was published in the defendant’s newspaper of October 4, 1895, and was in these words:

“NO RECOURSE.

“Profligate son of widow causes her much trouble. He deserts her for a married woman, with whom he is living suspiciously. Mrs. Mary Simmons is a widow, who has a son named Norman, aged seventeen. This boy is her only support, and he has been working for a woman named Brant. About a year ago Mrs. Simmons thinks that the woman became smitten with the boy, and for that reason got a divorce from her husband. She then established relations with the boy, since which time he has been worthless to his mother. He is now said to be living with the Brant woman, to the great distress of his mother, who called at the district attorney’s office this morning and implored assistance in getting the lad under control. She was told he was not violating the law by living away from her, and no complaint could issue. The old lady now thinks she can show the parties are living in unlawful intercourse, when she will again apply for a complaint.”

The answer admitted the publication of the article counted upon, affirmed its truth, and justified upon that ground; but alleged in mitigation that the publication was made without any actual malice, but in good faith, and only after an investigation which satisfied defendants of the truth of the matters published.

Upon the issue of actual malice thus made, plaintiff, at the trial, offered in evidence the article referred to in the order granting a new trial. This last article was published in defendants’

newspaper on the evening of the day on which plaintiff's action was commenced (October 18, 1895,) and as appears therefrom was evidently inspired by a knowledge of that fact. It was in these words:

"AFTER THE STUFF.

"Mrs. Brant takes exceptions to a 'Record' scoop. She bases an action for damages in the sum of \$20,000 on alleged libel. Mrs. Nannie T. Westerfield, the divorced wife of Fred B. Brant, brought suit this morning against Edward W. Scripps, Paul H. Blades and others of the Record Publishing Company, for \$20,000, for alleged false and malicious publication printed in the issue of October 4th concerning Mrs. Brant. The article in question was a statement of Mrs. Mary Simmons, a widow, who called at the district attorney's office to ascertain what could be done in reference to securing control of her seventeen year old son, Norman, who she stated had been drawn from her by the Brant woman. She also said that the Brant woman had lately gotten a divorce from her husband, and that since that time the boy had been with her almost all the time. It is to these statements of Mrs. Simmons as published that Mrs. Brant takes offense and thinks that she has been injured. A bond of \$500 was filed with the suit, which secures the costs of both parties and \$100 attorney's fees as provided by the statute, to be paid the defendant's attorneys in the event of plaintiff's failure to sustain her case, which sum Mrs. Westerfield will doubtless have to pay."

To the introduction of this evidence defendants objected that it was irrelevant and immaterial; but the objection was overruled and the article admitted. This ruling constitutes the basis of the assumed error adverted to in the order of the court below.

Respondents contend that the admission of the article in evidence was erroneous, because it was not a repetition or reassertion of the libel complained of, but no more than a fair statement of the privileged fact that the action had been commenced, giving the substance of the complaint. We are unable to coincide with this construction of the purport and effect of the publication. It is true it was not a repetition *verbatim et literatim* of the terms of the original article, but it is clearly to our minds in substantial effect a reiteration of the substance of that article. While it does not repeat the words, it refers specifically to the

first article by date of publication, with a statement of its subject matter in terms which are, in themselves, clearly libelous, and with the added vice of a very clear implication of the truth of such original statements. Such repetitions are always admissible in actions of libel and slander, upon the question of actual malice; and they are not required to conform to any exact standard of similitude in terms with the original words, so long as they are of similar import. If the language relates to the same subject matter and is of a character from which a malicious purpose may be inferred, it is admissible. (*Chamberlain v. Vance*, 51 Cal. 75; *Harris v. Zanone*, 93 Cal. 59, 68; *Ogden on Slander and Libel*, 270, 271.) The article in question came clearly within this rule and the fact that it contained a reference to the commencement of the action which, standing alone, might be regarded as privileged, could not operate to exclude it so long as there were statements therein not covered by such privilege. (*Preston v. Frey*, 91 Cal. 107.)

It is further contended that the evidence was improperly admitted, even conceding that it was a substantial repetition of the original libel, for the reason, as it is urged, that such original was shown to have been published by defendants' employees without the knowledge or consent of defendants, and without any actual malice on their part, and that it was not shown that said second publication was made by defendants personally, or with their knowledge or consent; and it is said: "Here is presented the anomaly of a publication, made at most with implied malice, being admitted to intensify the malice which in fact never existed in the first publication." But while there was positive testimony on behalf of the defendants, without direct contradiction, that the original article was published without their knowledge and with no actual malice, this evidence was not conclusive upon the question of malice in fact. There were circumstances from which the jury were at liberty to find against those positive statements. The assertion in the answer of the truth of the statements of the original publication, without apparently any proper investigation to ascertain the truth, and without any effort to establish it at the trial, was, in itself, a circumstance which the jury could consider as tending to contradict the testimony on behalf of defendants upon the question

of malice (*Blumhardt v. Rohr*, 70 Md. 328; *Lowe v. Herald Co.*, 6 Utah, 175; *Cruikshank v. Gordon*, 118 N. Y. 178); and the publication of the article in question was also a circumstance tending to contradict such evidence. It was not incumbent upon plaintiff to show that this second article was published with the knowledge of defendants. Its publication in their paper was presumptive evidence of that fact, the burden of overcoming which rested with them.

From these considerations we are satisfied that the evidence objected to was properly admitted, and that the ruling of the court thereon did not afford ground for a new trial.

There is some effort made by respondents to show that there was error in certain of the instructions given by the court; and that the new trial was properly granted for that reason. The criticism made upon the instruction relating to exemplary damages is based upon the same misconception of the effect of the evidence on the question of malice as that disclosed in the objection last discussed. As we have seen, there was evidence upon which the jury were at liberty to find the existence of actual malice; and in that view the question was correctly submitted to the jury. (*Taylor v. Hearst*, 107 Cal. 262; *Childers v. Mercury Co.*, 105 Cal. 290; 45 Am. St. Rep. 40.)

The instruction with reference to defendants' plea of justification was properly given (*Lowe v. Herald Co.*, *supra*; *Cruikshank v. Gordon*, *supra*; *Bacon v. Michigan Cent. Ry. Co.*, 55 Mich. 224; 54 Am. Rep. 372.)

It follows that the court below was in error in granting a new trial, and its order must be reversed. It is so ordered.

Garoutte, J., and Harrison, J., concurred.

Hearing in Bank denied.

[Sac. No. 353. Department Two.—January 18, 1898.]

EDWARD FALLTRICK, Appellant, v. P. SULLIVAN, Respondent.

ELECTION CONTEST — POWER OF ADJOURNMENT OF SPECIAL SESSION — PRIOR ENGAGEMENT OF COURT—JURISDICTION.—Section 1120 of the Code of Civil Procedure is not to be construed as limiting the power of adjournment by the court of a special session ordered for the trial of an election contest, merely from day to day or upon good cause shown by either party, not exceeding twenty days; but the court has power of its own motion to adjourn the session for several days, on account of a prior engagement of the court rendering such adjournment necessary, and the court does not lose jurisdiction to try the contest on account of such adjournment.

ID.—ILLEGAL VOTES—INSUFFICIENT REGISTRATION.—Votes cast at an election for school trustees of persons whose names had not been enrolled upon the great register of the county fifteen days prior to the election are illegal, and must be rejected in determining an election contest.

ID.—OATH AS TO QUALIFICATION—CONSTRUCTION OF CODE. — The fact that section 1600 of the Political Code, which provides for the reception of a vote upon the voter taking the oath prescribed by that section, was not amended so as to conform to the amendment of 1893 to section 1083, requiring registration of the voter fifteen days prior to an election, does not determine the legality of the vote cast by the one who has taken the oath.

ID.—CANCELLATION OF GREAT REGISTER—JURISDICTION OF SUPERVISORS. The great register of a county must remain for all purposes required by law before the completion of a new register; and the board of supervisors have no authority to declare the old register canceled before the registration of the new register is complete.

APPEAL from a judgment of the Superior Court of Sacramento County. A. P. Catlin, Judge.

The facts are stated in the opinion.

Holl & Dunn, for Appellant.

C. T. Jones, and C. P. Kearney, for Respondent.

HAYNES, C.—Plaintiff, an elector, contested the election of defendant to the office of trustee of American River school district, in the county of Sacramento, and sought to have it adjudged that B. Ferant was elected to said office. The defendant had judgment, and plaintiff appeals therefrom. The evidence is brought up by bill of exceptions.

This proceeding was brought under the provisions of the Code of Civil Procedure entitled, "Of contesting certain elections." The bill of exceptions shows that said contest came on regularly for trial on July 8, 1896, and the trial was proceeded with on that day and the day following, when the court, on its own motion, continued the further hearing of the case until July 14th; that no motion or affidavit for such continuance was made by either party; that it was made without objection, after consultation with the attorneys of both parties, and to a day agreeable to them, and was made because of another engagement of the court, and the trial was proceeded with and concluded on the 14th without objection or exception by either party; and it is now contended by respondent that the court lost jurisdiction of the cause by said adjournment.

Section 1118 of the Code of Civil Procedure requires the court, upon the statement of contest being filed, to "order a special session" of the court to be held on a day named, not less than ten nor more than twenty days from the date of such order, to hear and determine such contest.

Section 1121 of the Code of Civil Procedure it as follows: "The court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until such trial is ended, and may also continue the trial, before its commencement, for any time not exceeding twenty days, for good cause shown by either party upon affidavit, at the costs of the party applying for such continuance."

In support of his contention respondent cites *Keller v. Chapman*, 34 Cal. 640; *Norwood v. Kenfield*, 34 Cal. 332; *English v. Dickey*, 128 Ind. 174; *McCrary on Elections*, sec. 421.

In *Keller v. Chapman*, *supra*, after the trial had progressed for two days, the court, on contestant's motion, and against defendant's objection, adjourned further proceedings therein for seven days. The ground upon which the continuance was granted do not appear. The court said: "The summary nature of the proceeding is inconsistent with the exercise of the general discretionary power of granting continuances possessed by courts in civil actions. The expression of the particular mode and time of continuance is conclusive of all nonenumerated modes and

times. The continuance from the 6th of the month, when the case was on trial, to the 13th of the same month, against the objections of the respondent and without an affidavit showing cause, was unauthorized, and operates as a discontinuance of the proceedings."

The court was there dealing with the question of "the general discretionary power of the court to grant continuances" where no cause was shown by affidavit, and held that no such power existed except as to the continuances provided for in the statute. Here the continuance was not made at the instance of either party, but was made by the court because of another engagement "of the court," and without objection from either party. It was not as we must assume another engagement of the Hon. A. P. Catlin, as an individual, but of the court, and we are bound to assume that it was imperative, and fully justified the continuance, if a continuance could be ordered for any cause otherwise than from day to day.

The next case cited (*Norwood v. Kenfield, supra*) involved a radically different question. Under the judicial system then prevailing there were "terms" of court, and except during the terms there was no court, and the judge could perform no judicial act except those authorized by statute. In that case, after the order fixing the day for the special term, the judge, in vacation, and before the day fixed for the commencement of the special term, continued the trial to a later day, on which day the defendant appeared and objected to the jurisdiction of the court, upon the ground that the county judge had no authority at chambers to make the order continuing the case. This objection was overruled. The supreme court held that "there was no term in existence at which a trial could be had, and the whole proceeding was a nullity"; that the court did not meet at the time designated, and until the special term commenced there was no power to order the cause adjourned to another day. The question as to the power of the court to adjourn the hearing after the trial commenced was not involved. In the case now before us no question arises as to "terms" of court, nor as to the constant existence of the court. By the provisions of the constitution the superior courts are always open, the intervals in which no business is transacted being regarded as recesses, and

by "sessions" is meant the time during which the court is in fact engaged in business as a court (Const., art. VI, sec. 5; Code Civ. Proc., secs. 73, 74; *In re Gannon*, 69 Cal. 544, 545); and accordingly section 1118 of the Code of Civil Procedure directs that "the superior court"—not the judge—"shall order a special session of such court to be held," etc. The "court," therefore, did not cease to exist, as such, by the continuance of the cause, leaving only the question as to whether the court lost jurisdiction of the case; in other words, whether the court, its existence as a court being unaffected, can, for sufficient cause, adjourn the hearing, after it is commenced, otherwise than from day to day.

The statute contemplates a prompt and speedy determination of election contests; but it cannot be presumed that the legislature intended that under no circumstances, however essential to the administration of justice, and especially in a matter in which the public as well as the parties have an interest, could an adjournment be had otherwise than from day to day. Contingencies might be readily imagined where, without the fault of the court or of either party, an interruption of several days would be unavoidable.

The case of *Lord v. Dunster*, 79 Cal. 477, 486, is an illustration; though there the continuance was asked on December 31st to January 2d, which was in effect but one day, the first being a holiday. The purpose for which the continuance was asked, the showing made in support of it, the fact that the motion was made after the submission of the case, though before the decision was announced, and the spirit and scope of the decision, all tend strongly to support my conclusion in this case that the court did not lose jurisdiction. The facts in *Lord v. Dunster*, *supra*, in my judgment, would have required the same judgment in this court if the time required to produce the witnesses had made a longer continuance necessary.

In this case we are justified in assuming that the prior engagements of the court were at the least as imperative as the requirements of the statute under consideration, and that it was not intended that where the inability of the court to proceed with the case makes a continuance for several days necessary, that the court should lose jurisdiction. The statute declares that the court "shall have all the powers necessary to the determination

thereof." (Code Civ. Proc., sec. 1121. See, also, the concluding paragraph of *Minor v. Kidder*, 43 Cal. 229.)

Appellant contends that the judgment should be reversed because the evidence is insufficient to justify certain findings.

The court found that forty-three votes were cast and counted for the defendant, P. Sullivan, and that forty-two votes were cast and counted for B. Feraut; and that no illegal votes were cast for Sullivan, and confirmed his election.

Appellant contends that the evidence shows that Dominico Sorrocco, Raffelo Cassello, Julian Feraut, John Inderkum, and W. J. Donahue voted at said election for Sullivan, and that none of them were entitled to vote.

That each of said five persons voted is not questioned, but respondent contends that there is a conflict in the evidence as to the person for whom they voted. We see no conflict, however. Inderkum identified his ballot, and it bore Sullivan's name and was counted for him. The printed tickets all bore Sullivan's name, and were red or pink in color. Feraut's tickets were written on common white paper. The evidence is satisfactory and uncontradicted that none but white tickets were voted for Feraut, that all red tickets were voted for Sullivan, and in addition some white ones; and there was positive testimony that each of the five voted a red ticket, and no witness testified to the contrary. Inderkum and Donahue were both examined as witnesses on the part of the defendant, but no effort was made to show that they did not vote for Sullivan.

The ground upon which appellant claims they were not entitled to vote is that they were not enrolled on the great register of voters fifteen days before the election. As to this fact, also, there is no controversy.

Section 1083 of the Political Code, as it stood before the amendment of 1893, simply required that the name of the voter "shall be enrolled on the great register of the county." This provision was amended in 1893 by adding the words, "fifteen days prior to an election." Stats. 1893, p. 124.)

Under the title, "Election for School Trustees," the Political Code, section 1598, provides: "Every qualified elector of the county, who has resided in the district for thirty days next preceding an election, may vote thereat."

Under these provisions, it is clear that, if the five persons above named were not qualified electors of the county, they were not entitled to vote for school trustees, enrollment on the great register fifteen days before an election being essential.

But it is claimed by respondent that section 1600 of the Political Code modifies this requirement as to registration.

That section prescribes the oath to be administered to a person whose right to vote for school trustees is challenged, and as to registration provides as follows: "And that your name is on the great register of this county"; and said section further provides: "If he takes the oath prescribed in this section, his vote must be received, otherwise his vote must be rejected."

This section, as it now stands, was enacted in 1880, and has not been amended to conform to section 1083 as amended in 1893, and which prescribes the qualifications of voters "at any and all elections held within the county, city, town, or district within which such elector resides"; and all the qualifications specified in that section, including that of enrollment on the great register fifteen days before an election, are imported into section 1598 relating to the election of school trustees.

But section 1600, prescribing the oath to be taken by a person whose vote is challenged, does not determine the legality of a vote cast by one who has taken the oath. It prescribes a summary mode of determining whether the vote shall be received, and does not determine its legality for any other purpose, else one who had willfully and for fraudulent purpose sworn falsely would thereby become in effect a legal voter, and no contest against one elected by such votes could possibly succeed. There is no provision of the statute giving the oath any other effect than that of determining the duty of the board to receive the vote. Though the challenger may know that the oath is false, and be able to prove it at the time, the vote must nevertheless be received, as otherwise the whole time of the board might be occupied with trials of challenges, and qualified voters be thereby deprived of all opportunity to vote.

Respondent calls attention to the fact that this election was held on June 5, 1896, that on May 29th, nine days before the election, the board of supervisors canceled the great register; that these five persons were registered between the 1st and 4th of

June, and argues that, if appellant's contention is sound, there were no qualified electors in the district at the time the election was held.

There is nothing in this contention. It is true the county clerk testified that the great register was "canceled" on May 27th, but he evidently testified to a mere conclusion of law. The statute makes no provision for canceling the old register before commencing a new one. Section 1094 of the Political Code (Stats. 1895, p. 228), provides, among other things, that in those counties where registration is not required previous to each general election, a new and complete registration of the voters of such counties shall be made, "when required by the board of supervisors. . . . Such registration shall commence one hundred and sixty days before a general election and continue for seventy-five days thence next ensuing, when said registration shall cease."

School trustees are required to be elected annually on the first Friday in June, and it is obvious that the old register must remain for all purposes required by law before the completion of the new register, and the board of supervisors have no authority to declare it canceled before the registration is completed. It should be added that the five persons alleged to have voted illegally for respondent were not enrolled upon the great register alleged to have been canceled, and that Cassello's name was not in fact enrolled upon the register at any time, the clerk having subsequently refused to enter it, upon the ground that he was not qualified, though he gave him a certificate of registration at the time of his application to register. But the only certificate authorized by the statute is a "certified copy of the entries upon the great register relating to such party." (Pol. Code, sec. 1107.)

One ballot was cast upon which the name of P. Sullivan was printed and the name "John Inderkum" was written in ink about an inch below the printed name, which was not erased. This ballot was counted for Sullivan by the election board and also by the court. The evidence shows that this ballot was cast by Inderkum, and, as he was not entitled to voter for want of timely registration, what construction the law would place upon such ballot need not be considered.

The judgment should be reversed and the cause remanded for further proceedings.

Chipman, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for further proceedings.

Henshaw, J., Temple, J., McFarland, J.

[Crim. No. 332. Department Two.—January 18, 1898.]

THE PEOPLE, Respondent, v. CHARLES SLATER, Appellant.

CRIMINAL LAW — ABDUCTION OF FEMALE MINOR FOR PROSTITUTION —

JURY—CHALLENGE TO PANEL—SHERIFF AS WITNESS FOR PROSECUTION.—Upon the trial of a defendant accused of having taken a female under the age of eighteen years from her father without his consent, for the purposes of prostitution, it is not ground for challenge to the panel of the trial jury that the sheriff who served the venire was examined as a witness for the people upon the preliminary examination of the defendant, where the sheriff testified that he had no bias against the prisoner.

ID.—HOUSE OF ILL FAME—MODIFICATION OF INSTRUCTION.—An instruction requested by the defendant as follows: "If you find from the evidence that the house where the defendant took the girl is only a house where one woman lives, then I charge you that such a house is not a house of ill-fame," is properly modified by adding the words, "unless it is used for the purposes of prostitution."

ID.—INSTRUCTION AS TO PURPOSE OF STATUTE.—An instruction containing a brief statement of the purpose or intention of the statute, and that it was "for the protection of females under a certain age," though unnecessary, is not materially objectionable, where the jury were elsewhere distinctly told that it applied to "females under the age of eighteen years."

ID.—ILLUSTRATIVE INSTRUCTIONS—ASSUMPTION OF FACTS—HARMLESS ERROR.—Instructions containing statements of inferences or conclusions of fact, from other facts stated or assumed to exist, should not be given, but where it appears that such instructions were merely intended as illustrations and not as facts proved in the case, and are followed by a proper and specific instruction clearly submitting all the essential facts in the case to the jury, so that they could not be misled by the illustrative instruction, any error in giving them is without prejudice to the defendant.

ID.—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY — CHARACTER OF HOUSE—INTENTION OF MARRIAGE.—Where the character of the house to which the girl was taken by the defendant was clearly established, and there is ground for the conclusion that he took her away for the purpose of prostitution, notwithstanding the testimony of the defendant that he intended to marry her "as soon as he got money enough," the question involved is one of fact for the jury to determine from the whole evidence, and their verdict of guilty will not be disturbed for insufficiency of the evidence to show that the defendant intended to use the girl as a prostitute.

ID.—EVIDENCE—PROOF OF AGE—FAMILY BIBLE—EXPLANATORY EVIDENCE —QUESTION FOR JURY.—A family Bible as admissible in evidence upon the question of the age of a child; and where the condition of the entry of birth requires explanation, the entry and explanation are properly submitted to the jury, and will not be considered upon appeal, especially where the positive testimony of the parents as to the age of the child is sufficient independently of the family record.

APPEAL from a judgment of the Superior Court of Del Norte County. James E. Murphy, Judge.

The facts are stated in the opinion.

E. McNamara and Walter F. Jones, for Appellant.

W. F. Fitzgerald, Attorney General, and C. N. Post, Deputy Attorney General, for Respondent.

HAYNES, C.—The defendant was tried upon an information for taking away from her father a female under the age of eighteen years, without his consent, for the purposes of prostitution. He was convicted, and sentenced to imprisonment at San Quentin for two years and six months, and to pay a fine of one thousand dollars, and he now appeals from said judgment and from an order denying a new trial.

1. A venire was issued for thirty jurors, and it was served by the sheriff. The defendant challenged the panel upon the ground that the sheriff was examined as a witness on behalf of the people upon the preliminary examination of the defendant.

This challenge was properly denied. The sheriff testified that he had no bias whatever against the prisoner, and therefore the challenge was not good under subdivision 2 of section 1072 of the Penal Code, nor was there any implied bias within the provisions of section 1074 of the same code. Section 302, sub-

division 4, of the Code of Civil Procedure has no application, the only grounds for such challenge in criminal cases being specified in above-named sections of the Penal Code. Section 1046 of the Penal Code refers to the "manner" in which juries in criminal cases are formed, and not to the qualifications of the officer serving the venire.

2. It is contended that the court erred in amending the fourth instruction requested by the defendant.

The instruction, as requested, is as follows: "If you find from the evidence that the house where the defendant took the girl is only a house where one woman lives, then I charge you that such a house is not a house of ill-fame." The court added, "unless it is used for the purposes of prostitution." The amendment was pertinent and proper. A house kept by one woman may be entirely respectable and the woman virtuous; but one woman may be unchaste and may keep a house of ill-fame to which others resort for purposes of prostitution.

3. Appellant contends that the court erred in giving the second, third, and fourth instructions to the jury.

The fourth instruction was a brief statement of the purpose or intention of the statute, and we see no material objection to it, though it was unnecessary; the question being whether the defendant had violated its provisions.

The second and third instructions, given at the request of the district attorney, are statements of inferences or conclusions of fact from other facts stated and assumed to exist, though not purporting to be the facts of this case. The said second instruction is as follows:

"When a girl is taken from her father's roof and conducted to a house of prostitution, the fair and reasonable inference is, that she is taken there for the purposes of prostitution." The third of said instructions is similar, and need not be quoted. These instructions should have been omitted; though taken in connection with the fifth instruction, it is apparent they were intended merely as illustrations, and not as facts proved in the case. Said fifth instruction is as follows: "Therefore, if you find that the female, Myrtle Brock, was on the sixth of June, 1897, under the age of eighteen years, and that the defendant,

Charles Slater, on that day took the said Myrtle Brock from her father, without his consent, for the purpose of prostitution, it is your duty to find him guilty as charged."

As abstract propositions the second and third instructions were correct; and, if they had not been followed by the fifth, might have been misinterpreted as intimations of the court's opinion upon questions of fact. The fifth, however, plainly showed they were mere illustrations, and clearly submitted the essential facts to the jury. We think the jury were not misled, and that the defendant was not prejudiced.

The special objection made to the fourth instruction is "that in effect the jury were told the age of the girl was not to be considered." In that instruction, in speaking of the intention of the statute, it was said it was "for the protection of females under a certain age"; but in the first and fifth instructions it was distinctly stated that it applied to "females under the age of eighteen years."

4. Appellant also contends that the evidence does not support the verdict; that "there is no evidence in the record that goes to prove that the defendant ever intended to use the girl as a prostitute."

It is scarcely necessary to notice this contention. The question involved in it is one of fact for the jury to determine from a consideration of the whole of the evidence. The character of the house to which the girl was taken by the defendant was clearly established. No ill-treatment or other reason appeared to suggest any ground for removing her from her parents' home. If the defendant intended to marry her "as soon as he got money enough," he should have left her at home with her parents. But that reason will not bear investigation. In taking her away he assumed her support, and he could as well have supported her as his wife; and if he intended to make her his wife he would not have voluntarily pursued a course which would inevitably result in destroying her reputation. Without pursuing the subject further, it is evident there was ample grounds for the conclusion that he took her away for the purpose charged.

5. The family Bible was properly admitted in evidence. The condition of the entry of the girl's birth required explanation, and the entry and explanation were properly submitted to the

jury. Besides, the positive testimony of her father and mother as to her age were quite sufficient without the family record contained in the Bible.

No other questions are noticed by counsel for appellant, nor do we find any others in the record requiring notice.

The judgment and order appealed from should be affirmed.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Henshaw, J., Temple, J., McFarland, J.

[L. A. No. 273. In Bank.—January 18, 1898.]

P. W. MURPHY, Appellant, v. CITY OF SAN LUIS OBISPO,
Respondent.

BONDS FOR MUNICIPAL IMPROVEMENTS — CONSTRUCTION OF STATUTE — ELECTION OF MUNICIPALITY AS TO GOLD COIN.—Under the terms of the original act of March 19, 1889, providing for the issuance and sale of bonds of a city to pay the cost of municipal improvements authorized by the voters, the municipality was not required to designate the kind of money in which the bonds should be payable, and, in the absence of such designation, could at maturity elect to pay them in any lawful money, and the purpose of the legislature in the amendment of 1893, providing that such bonds "shall be payable in gold coin or lawful money of the United States," was not to require that the bonds should express that alternative, but, to confer the power of election upon the municipality to make the bonds payable in gold coin only.

ID.—MODE OF HOLDING ELECTION—PROVISIONS OF ORDINANCE—MANDATORY REQUIREMENT—INVALID ELECTION.—An ordinance of a city designating the mode of holding an election for the issuance of bonds for municipal improvements, having been passed by virtue of the statute authorizing it, has the force of a statute, and is to be construed with the same effect as if its terms had been prescribed by an act of the legislature; and where the ordinance provides that "each voter shall indicate his wish by writing or causing to be written or printed 'yes' or 'no' on the right-hand margin on his ticket opposite the proposition on which he may desire to vote," such requirement is mandatory, and a disregard of it renders the vote nugatory; and where the ballots contained an improper notice printed upon them, "to vote for or against a proposition, place an

'X' in the square at the right," and more than two-thirds of the voters followed such direction, instead of following the direction given in the ordinance, the election is invalid.

ID.—ALTERNATIVE OF MAKING INTEREST PAYABLE ANNUALLY OR SEMI-ANNUALLY—SUBMISSION TO VOTERS.—It was not necessary to submit to the voters the alternative of making the interest on the proposed bonds payable annually or semi-annually, but it is sufficient that the ordinance states the times at which the interest shall be payable; and it is only the amount of the bonds and the rate of interest which constitute the indebtedness proposed to be incurred, and upon which the voters are to express their wishes.

APPEAL from a judgment of the Superior Court of San Luis Obispo County. V. A. Gregg, Judge.

The facts are stated in the opinion of the court.

Graves & Graves, for Appellant.

W. H. Spencer, and T. M. Osmont, for Respondent.

H. E. Doolittle, City Attorney of City of San Diego, W. E. Dunn, City Attorney of the City of Los Angeles, H. T. Creswell, City Attorney of the City and County of San Francisco, Thomas McNulta, City Attorney of the City of Santa Barbara, Robert Y. Hayne, Delmas & Shortridge, Chickering, Thomas & Gregory, Rosenbaum & Scheeline, James A. Gibson, and Harry L. Titus, *Amici Curiae*, for option of city to make bonds payable in gold coin only.

Works & Works, and Works & Lee, *Amici Curiae*, *contra*.

HARRISON, J.—The board of trustees of the city of San Luis Obispo, having advertised for the sale of certain bonds of the city for the purpose of paying the cost of certain municipal improvements authorized by the voters under the provisions of the act of March 19, 1889 (Stats. 1889, p. 399), the plaintiff, a taxpayer of the city, brought the present action to enjoin the sale of the bonds and the levy and collection of any taxes for their payment, upon the ground that their issuance was illegal. The superior court rendered judgment in favor of the defendants, and the plaintiff has appealed therefrom. The notice of appeal states that an appeal is also taken from an order denying a new trial, but the record does not contain such order, nor does it appear therefrom that a new trial was ever asked for or denied.

The appellant presents three grounds upon which he contends that the issuance of the bonds is illegal, viz: 1. That the bonds are made payable in gold coin of the United States, instead of being made "payable in gold coin or lawful money of the United States"; 2. That at the election upon the question of their issuance the votes were not cast in accordance with the terms of the ordinance by which the question was submitted; 3. That the question whether the interest on the bonds should be paid annually or semi-annually was not submitted to the voters.

1. Section 6 of the act of March 19, 1889 (Stats. 1889, p. 401), provides: "All municipal bonds for public improvements issued under the provisions of this act shall be of a character of bonds known as serials, and shall be payable in the manner following [providing for the denominations of the bonds, and that one-twentieth of the issue must be paid in each year, but making no provision in reference to the times for the payment of interest]. Such bonds may be issued and sold by the legislative branch of the city, town, or municipal corporation as they may determine, at not less than their face value, in gold coin of the United States," etc. This section was amended in 1893 (Stats. 1893, p. 61), making the first sentence to read as follows: "All municipal bonds for public improvements issued under the provisions of this act shall be of the character of bonds known as serials, and shall be payable in gold coin or lawful money of the United States, in the manner following"; and also directing that one-fortieth of the issue must be paid in each year, and also that the interest "may be payable annually or semi-annually."

The notice under the ordinance calling the special election for the purpose of authorizing the issuance of the bonds in question stated: "The character of said bonds will be what is known as serial, and will be payable in gold coin of the United States, in the manner following [providing for distributing their payment over a period of forty years.] The rate of interest to be paid on said bonds will be five per cent per annum." The ordinance creating the indebtedness, and providing for the issuance and sale of the bonds, which was passed subsequent to the election, provided: "The character of said bonds shall be what is known as serial, and the same shall be payable in gold coin of the United States, in the manner following"; and further pro-

vided: "Each of said bonds shall be dated the sixth day of January, 1896, shall bear interest at the rate of five per cent per annum from said date, and to each of said bonds shall be attached as many interest coupons as it may have years to mature, each coupon to be for one year's interest on the bond to which it is attached, one of which coupons on each and every of said bonds shall be payable on the sixth day of January, 1897, and one on the same day of said month of each succeeding year until all are paid."

Under the terms of the original act the municipality was not required to designate any kind of money to which the bonds should be payable, and, in the absence of such designation in the bonds could at their maturity elect to pay them in any medium that might then be lawful money or legal tender. Whether the municipality had the power to designate in the bonds any specific kind of money in which they should be payable was an unsettled question. It had been held in *Judson v. Bessemer*, 87 Ala. 240, that the municipality possessed such power, while in *Woodruff v. State*, 66 Miss. 298, it had been held that such act was *ultra vires*, and that the bonds were void. The reversal of this case by the supreme court of the United States (*Woodruff v. Mississippi*, 162 U. S. 299) was upon a point which left the question undetermined by that tribunal. It has since been held by the supreme court of Kentucky in *Farson v. Board of Commrs.*, 97 Ky. 119, that under a statute authorizing a municipality to issue a bonded indebtedness, which is silent as to the kind of currency or money in which it is to be payable, the municipality may make the bonds payable in gold coin. Experience had shown that, if bonds are made payable in a currency of fluctuating value, they are less readily negotiated than if the lender or investor knows in advance the precise kind of money in which they will be paid. Under this condition of the law as it had then been expounded, and with the universal experience in financial transactions, and doubtless in consequence thereof, the legislature, in 1893, amended the statute by giving to the municipality the right to designate at the issuance of the bonds the specific kind of money in which they should be paid. It is to be assumed that the amendment was for the purpose of remedying some defect in the original act, but if the defect in the

original act was a want of power in the municipality to issue its bonds payable in any specific kind of money, as had been held by the supreme court of Mississippi, this defect would not be obviated if the statute required them to be "payable in gold coin or lawful money of the United States." In the absence of any limitation upon the mode of payment, they would be payable in any lawful money of the United States, and, as a provision in the bonds giving to the municipality the alternative of paying them in gold coin or in lawful money of the United States would create no obligation upon it to make the payment in gold coin, it follows that the "lawful money" in which they would be paid would be that kind which the municipality would elect at their maturity, and, consequently, the kind which at that date would have the least value. It cannot be held that the words "shall be payable in gold coin or lawful money of the United States" were inserted in the statute merely for the purpose of declaring that the municipality should have the option at the maturity of the bonds to pay them in gold coin, or in lawful money, since it needed no legislative declaration to give it that option. The fact that they were payable in money would itself confer upon it that privilege; and, as such a construction of the statute would destroy any efficacy in the amendment, it ought not to be given unless required by its terms. It is not so indicated in specific language, and, as its language will permit a construction by which the municipality may determine in advance whether the bonds shall be payable specifically in gold coin, or generally in lawful money of the United States, a consideration of the purposes of the statute and the objects to be effected by it justifies us in giving it this construction.

The purpose of the legislature in enacting the statute in question was to enable the municipalities of the state "to acquire or construct certain municipal improvements which the public interest or necessity might demand, the cost of which would be too great to be paid out of the ordinary annual income." Unless the bonds that are to be issued under the proceedings thus authorized can be negotiated, the municipality will be unable to acquire or construct the improvements, and the very purpose of the legislature will be defeated. The legislature must be assumed to have been familiar with the laws of trade and finance

—to have known that bonds payable in fluctuating currency are less salable than if payable in gold coin. Guided by experience and the history of the last forty years, they were aware that obligations which were to run for forty years in the future would be subject to the contingencies of a depreciated currency, and that, in the light of this experience, capitalists and investors would decline to invest their money unless they could be assured that they would receive the value which they should give for the bonds. The bonds authorized by this act, when issued, become negotiable securities and the subject of daily traffic in the commercial world, and any provision in them that impedes their free negotiability destroys their value, and prevents the municipality from effecting a sale in accordance with the terms of the act. The requirement in the statute that the bonds shall be sold "at not less than their face value in gold coin of the United States" would prevent the sale of a single bond whose payment at maturity could be made at the option of the maker in such currency as it might then elect, and thus the very object of the statute would be destroyed. The recognized standard of value in this state is gold coin, and, as this is the only kind of money which the legislature has authorized to be received upon a sale of the bonds, and has required them to be sold for not less than their face value, it must be held that it was the intention of the legislature that they might be made payable in gold coin.

There is an additional consideration which lends weight to this construction of the intention of the legislature by this amendment. By an act passed March 15, 1883 (Stats. 1883, p. 370), certain incorporated cities were authorized to refund their indebtedness by issuing new bonds therefor. The form of the bond was prescribed by the statute and made payable in "dollars" without designating any kind of money. On the same day that the aforesaid amendment to the act of March 19, 1889, was passed, the legislature amended the act of March 15, 1883 (Stats. 1893, p. 59), by giving authority to those cities to refund their indebtedness and issue serial bonds therefor, to run for forty years, "principal and interest being payable in gold coin or lawful money of the United States"; and also providing that the bonds should be sold for not less than their face value "in

the same character of money in which they were payable." The provision of this statute that the bonds shall be payable in gold coin or in lawful money of the United States, as in the statute under consideration, and the further provision in that statute that they should be sold for their face value "in the same character of money in which they were payable," clearly indicates that the municipality should exercise its option for the mode of the payment, at the issuance of the bonds, and not at their maturity, and that the bonds themselves should be payable in the kind of money for which they were to be sold. The same provision in section 6 of the act under consideration, coupled with the provision that the bonds are to be sold for gold coin at not less than their face value, carries with it the same intention of the legislature that the bonds may be made payable in gold coin. (See Sutherland on Statutory Construction, secs. 284, 288.)

In the case of *Skinner v. Santa Rosa*, 107 Cal. 465, cited by appellant, the ordinance calling the election, as well as the notice of election, described the bonds as "payable in gold coin or lawful money of the United States," with interest payable "annually" at a place to be fixed by the city council, while the bonds which the council proposed to sell were made payable "in gold coin" with interest payable "semi-annually" in the city of New York, and it was held that the bonds in this form, not having been authorized by the voters of the city, would be invalid. Whether, if the ordinance had provided that the bonds should be issued "payable in gold coin," its approval by the voters would have authorized the issuance of such bonds, was not before the court for decision or discussed in its opinion. The only bonds which the voters had approved were to "be payable in gold coin or lawful money of the United States"; that is, as we have seen above, payable in such money as the city might elect at their maturity, and it was held that the city could not be made liable for bonds payable in gold coin, as that would impose upon it a burden which the voters had never authorized.

2. Section 2 of the act of March 19, 1889, provides that the ordinance calling a special election "shall fix the day on which such special election shall be held, the manner of holding such election, and the voting for or against incurring such indebtedness; such election shall be held as provided by law for holding

such elections in such city, town, or municipal corporation." The ordinance in the present case stated:

"Sec. 6. The manner of holding said election shall be as follows: 1. As provided by law for holding elections in said city; 2. As provided by the general election laws of this state, except where such general laws may conflict with the state law for elections of the kind hereby called, or with this or any ordinance; and 3. As provided for in this ordinance." It was further provided in this section of the ordinance: "Tickets must be of ordinary election ticket paper, 6x12 inches; the heading of such tickets must be: 'Bond Election, City of San Luis Obispo.' Each proposition set forth in section 2 of this ordinance shall be voted on separately, and must be printed on such tickets as follows: 1. Bonding for city water works, \$90,000.00. 2. Bonding for sewer improvements, \$34,500.00. Each voter shall indicate his wish by writing, or causing to be written or printed, 'yes' or 'no' on the right-hand margin on his ticket, opposite the proposition on which he may desire to vote." At the election which was held under this notice more than two-thirds of the voters that voted indicated their wishes by voting a ticket in the following form:

MUNICIPAL TICKET.

BOND ELECTION.

City of San Luis Obispo.

To vote for or against a proposition, stamp a cross (X) in the square at the right.

1	Bonding for City Water Works, \$90,000.00 YES.	X
2	Bonding for City Water Works, \$90,000.00 NO.	
3	Bonding for Sewer Improvements, \$34,500.00 YES.	X
4	Bonding for Sewer Improvements, \$34,500.00 NO.	

and indicated their wishes in no other way than by stamping a cross opposite the propositions on said ticket. Whether the proposition to issue the bonds was legally adopted depends upon whether the ballots thus cast should have counted in its favor.

The provisions of the Political Code which are applicable to elections of officers are not by any statute made applicable to elections of the character under consideration, and we have not been

cited to any special statute on the subject governing elections in the city of San Luis Obispo. It will be observed that by the terms of the ordinance the general election law of the state is not applicable where it is in conflict with the mode pointed out in the ordinance, and that the provisions of the ordinance control unless they are in conflict with some of the provisions of the general law. It follows that the statutory provisions requiring the city to fix by its ordinance the manner of holding the election, and the voting for and against it, is the rule by which the voters are to act in voting upon the question. This ordinance, having been passed by virtue of the statute authorizing it, has the force of a statute, and is to be construed with the same effect as if its terms had been prescribed by an act of the legislature.

It is urged by the appellant that the manner of voting which was prescribed in the ordinance calling the election was mandatory upon the voters, and that as this manner was not observed the election was invalid. Whether the forms prescribed for holding an election are mandatory or directory, and whether their observance is essential to the validity of the election, depends upon the character of the acts prescribed. In *Tebbe v. Smith*, 108 Cal. 101, Mr. Justice Henshaw stated the rule as follows: "It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it, while the departure from the terms of a directory provision will not render it void, in the absence of a further showing that the result of the election has been changed, or the rights of the voters injuriously affected thereby; but the rule as to directory provisions applies only to minor and unsubstantial departures therefrom. There may be such radical omissions and failures to comply with the essential terms of a directory provision as will lead to the conclusive presumption that the injury must have followed." In *Kirk v. Rhoades*, 46 Cal. 398, it was held that, if the requirements of the statute which it is within the power of the elector to control are willfully disregarded, his vote should be rejected; and in *Lay v. Parsons*, 104 Cal. 661, it was held that the specific directions to the voter as to the mode in which he shall mark his ballot are mandatory and cannot be disregarded. In the absence of any direction, the manner in which the voter is to indicate his wish

may be immaterial, so long as his wish can be ascertained; but when the mode of its indication has been prescribed by authority of law, the form becomes a matter of substance, and courts are not authorized to say that it may be disregarded, and that the wish of the voter may be determined by conjecture. Whatever the statute requires the form to be is mandatory. In the present case, it may be a reasonable conjecture that the votes cast in the above form were intended to be in favor of the issuance of the bonds, but it is still only a matter of conjecture. If the voters had drawn a line through the "yes," it might be supposed that they intended to vote against their issuance, but if, instead of drawing a line through the "yes," they had stamped an "X" directly upon it, it would be uncertain whether they intended in this mode to indicate an affirmative vote, or to have it counted as a negative. It is equally a matter of conjecture, though, perhaps, with less uncertainty, where the "X" has been placed at the side of the "yes" rather than upon it. Let it be supposed that, with the direction which was given in the ordinance for the mode of voting, five hundred ballots had been cast, of which one hundred were marked in this mode, one hundred with a line drawn through the "yes," one hundred with the line drawn through the "no," one hundred with the "X" stamped upon the "yes," and one hundred with the words "for the bonds" written upon the ticket. Could it be said that the board would be authorized to declare that the election had resulted in favor of the issuance of the bonds, or that there was anything more than conjecture as to the wishes of the voters? The only safe rule is to hold the specific directions to be mandatory, and that the manifest disregard of them by the voter renders his vote nugatory. The notice which was printed upon the tickets that were used by the voters, "To vote for or against a proposition, stamp an 'X' in the square at the right," was unauthorized and gave to the voters no right to disregard the manner of voting which was directed by the ordinance calling the election. That direction in the ordinance was clear and unambiguous, and it must be held that, as it was disregarded, the election was invalid.

3. It was not necessary that the alternative of making the interest payable annually or semi-annually should be submitted to the voters. Section 3 of the act requires the legislative body,

after the ordinance has been published two weeks, to publish a "notice of such special election, the purpose for which the indebtedness is to be incurred, the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of the tax levy to be made for the payment thereof"; but makes no requirement with reference to the publication of the times at which the interest is payable. The indebtedness cannot be incurred without the assent of two-thirds of the qualified electors of the city voting at an election for that purpose (Const., art. XI, sec. 18); but it is not requisite under this provision, or the aforesaid statute, that the voters shall determine in the first instance whether the interest shall be paid annually or semi-annually. The amount of the bonds and the rate of interest constitute the indebtedness proposed to be incurred, and upon which the voters are to exercise their wishes; but, as the city council is to determine in the first instance the rate of interest which the bonds are to bear, it may also in the first instance determine whether the interest shall be payable annually or semi-annually. Its determination upon this point may be stated in the proposition to the voters as readily as the rate of interest. The ordinance herein stated in sufficient terms that the interest was to be paid annually.

The judgment is reversed.

Henshaw, J., Temple, J., Garoutte, J., McFarland, J., and Van Fleet, J., concurred.

BEATTY, C. J., concurring.—I concur. This case certainly reverses one point decided in *Skinner v. Santa Rosa*, 107 Cal. 465. But although the point was involved in that case, it was not essential to the conclusion reached, which was fully sustained upon other grounds. And since the decision of that point cannot have given rise to any claim of vested right, it ought to be set aside if erroneous. A comparison of the act of March 1, 1893, amending the act of March 15, 1893 (Stats. 1893, p. 59), with the act here in question, which was passed on the same day, is conclusive as to the sense in which that legislature used the expression "payable in gold coin or lawful money of the United States." The same phrase must mean the same thing in both acts, and the former act shows clearly that the bonds were to be made payable

specifically in gold coin or specifically in lawful money, and not in either at the option of the municipality.

This construction also accords with the objects of the amendment, which, as shown by Justice Harrison, would have been defeated by any other construction.

[Crim. No. 392. In Bank.—January 18, 1898.]

Ex Parte ROSA QUEIROLO on Habeas Corpus.

DIVORCE—CUSTODY OF CHILDREN—MODIFICATION OF DECREE—APPEAL—STAY OF PROCEEDINGS—CONTEMPT—VOID ORDERS—HABEAS CORPUS. An appeal from an order modifying a decree of divorce, so as to award to the father the custody of the minor children, which by the original decree were awarded to the custody of their mother, suspends and stays all proceedings, under the modifying order; and orders made pending such appeal, directing the mother to deliver the custody of the children to the father, and punishing her for contempt for refusal to obey such direction, are without jurisdiction and void, and she will be discharged from unlawful imprisonment therefor, upon *habeas corpus*.

Id.—STATUTORY CONSTRUCTION—EFFECT OF APPEAL FROM JUDGMENT.—The effect of an appeal from a judgment is purely a matter of statutory regulation, to be determined by a construction of the statute under which the appeal is taken, and, when its terms are clear and unambiguous, the court is concluded thereby, and its function is simply to enforce the statute, without regard to supposed evil consequences resulting therefrom.

WRIT of *habeas corpus* to the sheriff of the City and County of San Francisco, to test the validity of an order of the Superior Court of the City and County of San Francisco, imprisoning petitioner for contempt of court. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

James A. Devoto, and F. D. Brandon, for Petitioner.

VAN FLEET, J.—Application for discharge on *habeas corpus*. By the decree of divorce between petitioner and her husband the court awarded her the custody of the three minor children of the marriage; subsequently, the court modified its decree by awarding the custody of the children to the father. From the

decree as thus modified petitioner took an appeal to this court, which appeal is still pending. After the perfecting of said appeal by the petitioner, the court below made an order directing her to make immediate delivery of the children to the father; and upon her failure to comply adjudged her guilty of contempt, and committed her to the county jail, there to remain until she shall have complied with such order. Petitioner asks to be discharged, contending that the entire contempt proceeding and order therein is void for want of power in the court to proceed in the premises pending her appeal, and this contention must be upheld. That the order modifying the decree was one from which an appeal lies to this court is admitted, and that the appeal was properly perfected is not denied. Section 949 of the Code of Civil Procedure provides that in cases not provided for in certain other sections (of which this is one) the perfecting of the appeal in the manner here pursued "stays proceedings in the court below upon the judgment or order appealed from," except in certain designated cases—under which exceptions this case does not fall. It is obvious, therefore, from the very words of the statute, that the effect of the petitioner's appeal was to stay the hand of the court below in any effort looking to the enforcement of said modified decree; and the case is not to be distinguished in principle from the cases of *Foster v. Superior Court*, 115 Cal. 279, *Schwarz v. Superior Court*, 111 Cal. 106, *Stateler v. Superior Court*, 107 Cal. 536, *Ruggles v. Superior Court*, 103 Cal. 125, and numerous other cases decided by this court, wherein it is held that the effect of the appeal in instances of this character is to remove the subject matter of the adjudication from the jurisdiction of the court below pending the appeal, and suspend the power of that court to enforce its order or judgment until the appeal is determined. This being so, the coercive measures adopted by the superior court in this instance to enforce its decree were in excess of its power, and simply void; and the imprisonment of petitioner in pursuance thereof is without authority of law.

With the supposed evil consequences, suggested by respondent, as possibly flowing from this conclusion, the court may not concern itself in an instance such as this. The effect of an appeal from the judgment, as suggested in *Foster v. Superior Court*, su-

pra, is purely a matter of statutory regulation, to be determined by a construction of the statute under which the appeal is taken, and by the terms of which, when clear and unambiguous, we are concluded. It is for the legislature to make the law. Our function is simply to enforce it.

The petitioner is discharged.

Harrison, J., Garoutte, J., Henshaw, J., McFarland, J., Beaty, C. J., and Temple, J., concurred.

[S. F. No. 493. Department One.—January 20, 1898.]

JOSEPH KENNEDY, Appellant, v. JAMES B. CHASE et al.,
Respondents.

NEGLIGENCE—CORRESPONDING DUTY—INJURY TO PLAINTIFF—NONLIABILITY OF DEFENDANTS—NONSUIT.—There can be no negligence, without the existence of a corresponding duty upon the part of the persons against whom the negligence is charged; and there can be no liability of defendants for an injury to the plaintiff where, under the circumstances shown, it is clear that defendants were under no legal duty or obligation to protect plaintiff from the injury he received; and, where the evidence for the plaintiff discloses that no such duty existed, the plaintiff is properly nonsuited for want of proof of negligence of the defendants.

ID.—MASTER AND SERVANT—SAFE PLACE FOR WORK—EXTENT OF DUTY OF MASTER—PRIVATE EXCURSION OF SERVANT.—The duty of a master to furnish his servant with a reasonably safe place in which to work is limited to the premises where the employee is required to be for the purposes of his employment, and does not extend to his protection while upon private excursions outside of those limits, taken solely upon his own account.

ID.—EMPLOYMENT OF SERVANT UPON LIGHTER—PRIVATE EXCURSION TO VESSEL—INJURY IN HATCHWAY—NONLIABILITY OF MASTER.—Where the servant's place of employment was upon a lighter, from which a vessel was being loaded, and his work consisted in shoveling ballast from the deck of the lighter onto a staging erected outside of the vessel, and the servant made a private excursion upon the deck of the vessel, upon his own account and for his own convenience, to place his coat upon a main hatchway unnecessarily remote from the place of his employment, and, upon resuming his coat after quitting work, fell into a smaller hatchway on the deck which was outside the limits of his employment, and was injured by the fall, the master owed no duty to protect him against such injury, and cannot be held liable therefor.

ID.—VOLUNTARY ENTRY UPON VESSEL OUT OF SCOPE OF EMPLOYMENT—LICENSEE AT SUFFERANCE—NONLIABILITY OF OWNERS OF VESSEL.—The plaintiff, in going about upon the vessel without the permission or invitation of the owners or master thereof, and outside the scope of his employment in loading the vessel was a mere licensee at sufferance, and the owners of the vessel owed him no duty to protect him against injury in a part of the vessel where he was neither invited nor expected to go; but the extent of the liability assumed by the owners of the vessel was that their decks should be reasonably safe where the plaintiff was required by his employment to traverse, them and not elsewhere.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. A. A. Sanderson, Judge.

The facts are stated in the opinion of the court.

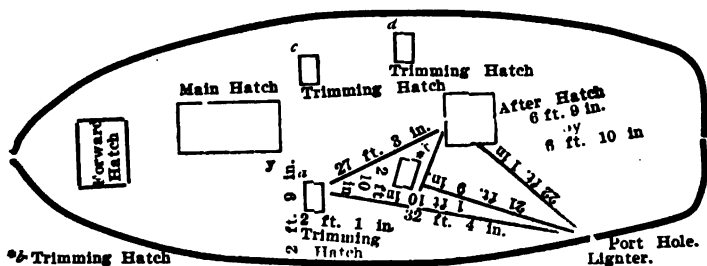
Reddy, Campbell & Metson, for Appellant.

Joseph Mee, and R. Percy Wright, for Respondent James B. Chase.

T. M. Osmont, for Respondents George Plummer and Others, Owners of the Ship "John A. Briggs."

VAN FLEET J.—Appeal by plaintiff from a judgment of nonsuit. The complaint alleged that plaintiff was employed by defendants as a stevedore to assist in placing ballast in the ship "John A. Briggs"; that defendants negligently and carelessly left open and unguarded a certain trimming hatch, in a dark and dangerous place on the freight deck of said ship, where plaintiff, "in performing his duties as such stevedore, and in the course of his employment, was compelled to go"; that plaintiff, while in the performance of his duties, fell through said hatchway and suffered the injury complained of. It was alleged that the defendant Chase, was a master stevedore, and that the other defendants were the owners of the vessel.

The evidence, an understanding of which will be facilitated by reference to the accompanying diagram, tended to show these facts:



The defendant Chase was employed as master stevedore to put ballast in the after part of the ship mentioned, which was lying at the wharf in the port of San Francisco and was engaged in that task. The work was being accomplished by bringing the ballast material on a lighter alongside the vessel to the point marked "port hole," shoveling it from the lighter onto a staging erected on the outside of the ship, between the lighter deck and the port hole, and from thence through the port hole onto the freight deck, where it was taken and dropped through the hatchways into the hold of the ship. On the day in question plaintiff was employed by the foreman of defendant Chase, as a laborer, to assist in putting in the ballast, his work being confined to the lighter, and consisting (in company with several fellow laborers) in shoveling ballast from the deck of the lighter onto the staging.

The mode of ingress and egress for the men to and from their work was by means of a plank from the dock to the main deck; by a ladder down the "after hatch," as shown on the diagram, to the freight deck, and thence, for those working on the lighter and staging, from the after hatch through the port hole.

Plaintiff went to work about 1 o'clock in the afternoon. On reaching the freight deck, instead of going direct to the port hole, he, without direction or request from anyone, walked forward to the point marked "main hatch," and left his coat on the coaming of that hatch, at "Y"; on quitting work at 6 o'clock in the evening plaintiff returned through the port hole, went again to the main hatch, secured his coat and started, as he testified, by a direct course from that point to the ladder at the after hatch to go ashore, but on his way, in some manner not made entirely clear, managed to walk into the trimming hatch, marked "A," fell through into the hold and was injured.

When plaintiff went to work it was light between decks, but

at the hour of quitting it was quite dark, but for the light afforded by a couple of candles; and as to the sufficiency of this to enable one to see his way clearly there is some conflict—several of the men who were preparing at the time to leave the vessel testifying that they could see the hatchway through which plaintiff fell, and warned plaintiff to look out for it, but plaintiff testifying that he could not see it, and heard no warning until he was falling. It did appear, however, without conflict that there was a candle held near the after hatch to light the way out.

The trimming hatch in question, like the others of its kind shown on the diagram, was a small hatchway used for putting in and trimming ballast; it was flush with the deck, without coaming, and had, like the others, been open all the afternoon, although it had not been used that day, as a part of the cargo of coal which yet remained in the forward part of the hold lay too near it; for this reason the ballast put in that afternoon had been put through hatches "B" and "D" only.

In substantial effect this was the showing made by plaintiff's evidence. It may be added that there was some slight discrepancy between the testimony of the plaintiff and that of his other witnesses as to the correctness of the diagram referred to, particularly as to the location of the port hole at which the lighter lay—the plaintiff being inclined to locate it about equidistant between the main and after hatches; but, if the fact be material, his testimony shows such uncertainty and apparent confusion in this, and one or two other respects relative to the situation of physical objects on the deck, and is so entirely overborne by the testimony of all his other witnesses on the subject, that it may be said to appear without substantial conflict that the diagram correctly shows, approximately, the relative positions of the various objects designated thereon, including the port hole.

This evidence shows no negligence on the part of defendants, and the nonsuit was properly granted on that ground. There cannot be neglect without the existence of a corresponding duty, and under the circumstances shown it is clear that defendants were under no legal duty or obligation to protect plaintiff from the injury he received. While an employer is required to furnish his servant with a reasonably safe place in which to work, this duty is limited to the premises where the employer is re-

quired, for the purposes of his employment, to be; it does not extend to his protection while upon private excursions outside of those limits, taken solely on his own account. Plaintiff's work was upon the lighter, and it may be conceded that he had a right of safe ingress thereto and egress therefrom; but in going forward to the main hatch plaintiff was not within the reasonable exercise of any right which he had on board the ship by reason of his employment. Conceding his privilege, as incident to his employment, to remove and deposit his coat while working, and to be protected while in the reasonable exercise of such right, it was neither reasonable nor necessary to select for the purpose a point so remote from his work. He had as well chosen to hang his coat in the rigging, or at the yard arm. No reason appears why he could not, like others of his fellow laborers, have laid the garment on the lighter, or in some place more convenient to the place of his employment, or the point of departure from the ship. His duty required him to leave the ship by as direct a route as practicable; he had no general right on board, but solely a right for the purposes of his special employment. In going where he did he not only went entirely out of his way, but was in pursuit of an object relating solely to his own personal convenience; and while perhaps, not in strictness a trespasser, he was at best but a mere licensee at sufferance, to whom the defendants at the time owed no duty.

An employee who leaves that portion of his master's premises where his duties require him to be, and goes about to his own convenience, becomes a licensee. (*Wright v. Rawson*, 52 Iowa, 329; 35 Am. Rep. 275; *Pfeiffer v. Ringler*, 12 Daly, 437.) The same doctrine is recognized in *Kauffman v. Maier*, 94 Cal. 269, 278.

It is conceded that the evidence does not show any employment of plaintiff by the owners of the vessel, but it is claimed that, plaintiff being lawfully upon the ship, it was duty of the owners, for a neglect of which they are responsible, not to leave unguarded holes upon the deck—upon the principle that the owner of premises is responsible to one coming thereon, by his invitation, for injury occasioned by their unsafe condition, and from a cause which could have been avoided by reasonable care.

But this principle, like that governing the responsibility of an employer, has its limitations. The duty of the owner in such a case has relation to the object for which the right of entry is extended, and is limited to responsibility for the condition of that portion of the premises required for the purposes of the visit; it does not impose liability for the want of safety at a point without those limits, and where the injured party was neither invited nor expected to go. (1 Thompson on Negligence, c. 7, p. 308; *Zoebisch v. Tarbell*, 10 Allen, 385; 87 Am. Dec. 660; *Murray v. McLean*, 57 Ill. 378; *Schmidt v. Bauer*, 80 Cal. 565.)

When the defendant owners permitted the plaintiff to go aboard the ship for a specific purpose, they did not give him the right, by implication or otherwise, to roam at will over their vessel for his own purposes. They undertook that their decks should be reasonably safe where plaintiff was required by his employment to traverse them, but not elsewhere.

"We have found no support for any rule," says Mr. Thompson, in speaking of the rights of trespassers or mere licensees, "which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or their relations with the occupant." (1 Thompson on Negligence, 303. See, also, *Redigan v. Boston etc. R. R. Co.*, 155 Mass. 44, 47; 31 Am. St. Rep. 520, and cases there cited.)

The circumstances clearly distinguish this case from those relied upon by appellant. In all those cases it will be found that the injury was received while the party was engaged in the performance of his work, or in a place where he had a right at the time for the purpose of his employment to be.

Judgment affirmed.

Harrison, J., and Beatty, C. J., concurred.

Hearing in Bank denied.

[S. F. No. 523. Department One.—January 20, 1898.]

ASA FISK, Respondent, v. E. J. CASEY, Administrator, etc.,
Appellant.

FORECLOSURE OF MORTGAGE—CONVEYANCE—DEFENSE—CLAIM OF OWNERSHIP BY MORTGAGEE—REFUSAL TO ACCEPT OFFER OF PAYMENT—BURDEN OF PROOF—FINDING—CONFLICT OF EVIDENCE.—In an action to foreclose a mortgage, made in the form of a conveyance to secure a note of the defendant, where the defendant pleaded as a defense that after the maturity of the note he applied to the plaintiff to ascertain the amount due thereon, for the purpose of paying the same, and having the property discharged from the lien of the mortgage, and that upon such application the plaintiff claimed to be the owner of the property, and refused to entertain any offer from the defendant to pay off and discharge the mortgage, the burden is upon the defendant to establish such defense to the satisfaction of the court by a preponderance of evidence, and where the evidence is conflicting as to what occurred between the parties, and the court finds that the plaintiff did not make the claim and refusal alleged, a judgment for the plaintiff will not be disturbed upon appeal.

ID.—ARGUMENTATIVE PLEADING—OFFER OF PAYMENT.—The answer should not allege an offer of payment argumentatively by a mere allegation of refusal, but it is incumbent on the defendant, if he would claim that the plaintiff was not entitled to interest after such offer and refusal, to allege such defense with definiteness, and to prove that it is well founded.

ID.—FINDING NOT CONTROLLED BY ORAL DECLARATION OF JUDGE—AFFIDAVITS NOT PERMISSIBLE TO IMPEACH FINDING.—The finding of the court that plaintiff did not claim to be the owner of the property, and did not refuse to entertain any offer from the defendant to pay off and discharge the mortgage, is not controlled by an oral declaration of the judge, made at the time of announcing the decision for the plaintiff, that he believed the testimony of defendant's witnesses concerning the interview; nor can the finding of the court be impeached by affidavits of what occurred when the decision was announced.

ID.—AMENDMENT OF ANSWER—INSUFFICIENT DEFENSE—PAROL AGREEMENT TO PAY TAXES ON MORTGAGE—EVIDENCE—VARIANCE OF WRITTEN AGREEMENT FOR INTEREST.—The court may properly refuse to allow an amendment to the answer which sets forth an insufficient defense, by alleging that at the time when the promissory note was made, which was secured by the conveyance of the defendant's land to the plaintiff, it was orally agreed between them that defendant should pay all taxes assessed on the land, including the taxes on the mortgage, the object of evidence of such parol agreement being to vary and destroy the written agreement for interest contained in the note, which could not be varied by proof of the averment of such parol agreement; and it is immaterial that the mortgage existed by virtue of a parol agreement that the deed should be given as security for the debt.

ID.—EVIDENCE—WILLINGNESS TO PAY NOTE.—The court properly refused to allow the defendant to testify that he was willing to pay the note or that he communicated such willingness to the plaintiff.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Charles W. Slack, Judge.

The facts are stated in the opinion of the court, and in its opinion rendered upon the former appeal, reported in 36 Pac. Rep. 668.

T. Z. Blakeman, and Benjamin Healey, for Appellant.

Daniel Titus, for Respondent.

HARRISON, J.—Action for the foreclosure of a mortgage. The facts are stated in the opinion rendered upon a former appeal. (*Fisk v. Casey*, 36 Pac. Rep. 668.) To a complaint in the usual form, the defendant alleges that after the maturity of the note he applied to the plaintiff to ascertain the amount due thereon for the purpose of paying the same and having the property discharged from the lien of the mortgage, and that upon such application the plaintiff "claimed to be the owner of the property, and refused to entertain any offer from the defendant to pay off and discharge said mortgage." The court found against the portion of the averment thus quoted, and rendered judgment in favor of the plaintiff.

The defense thus pleaded was an affirmative one on the part of the defendant, to be established to the satisfaction of the court by a preponderance of evidence, but the testimony of what occurred at the interview between the plaintiff and defendant, which was offered upon this issue, was conflicting, and the finding upon this conflict of evidence must be accepted as conclusive. It must be also noted that the defendant does not allege that he made any offer of payment, except argumentatively, and whether such offer was made is only to be inferred from his averment that the plaintiff "refused to entertain" an offer. It was incumbent upon him, if he would claim that the plaintiff was not entitled to interest upon the note or to a foreclosure of the mortgage, not only to plead such defense with definiteness, but also to introduce evidence that would fully satisfy the court

that his defense was well founded. The claim that an offer of payment was excused by the plaintiff's claim to be the owner of the property, and his refusal to entertain such offer, is answered by the finding that the plaintiff did not make such claim or refusal.

The finding of the court is not impaired by showing that at the time the judge announced his decision he stated, in answer to an inquiry by the attorney for the defendant in reference to the conflict of testimony, that he believed the testimony of defendant's witnesses concerning the interview. No particular portion of this interview was called to his attention, and the decision itself would indicate that he did not entirely disregard the testimony of the plaintiff. The court, moreover, was not concluded by such statement from subsequently making a finding contrary thereto, nor can its finding be impeached by affidavits of what occurred at the time the decision was announced.

The defendant also assigns as error the refusal of the court to allow him to amend his answer by alleging as a separate defense that at the time the promissory note was made it was verbally agreed between the plaintiff and the maker that the maker should pay all taxes thereafter to be assessed upon the land, including the taxes upon the mortgage. The court did not err in refusing to allow this amendment, inasmuch as proof of this fact would have constituted no defense to the action. The promissory note was a written agreement to pay interest, which, under the authority of *Daw v. Niles*, 104 Cal. 106, could not be varied by the proof of this averment. It is immaterial whether the mortgage existed by virtue of a written instrument or by a parol agreement that the deed should be given as security for the debt. The object of introducing such parol evidence was to destroy the written agreement to pay interest, which is contained in the note.

The court properly refused to allow the defendant to testify that he was "willing" to pay the note, or that he communicated his willingness to the plaintiff.

Judgment and order are affirmed.

Van Fleet, J., and Beatty, C. J., concurred.

Hearing in Bank denied.

[S. F. No. 627. Department Two.—January 20, 1898.]

F. E. WILDER, Respondent, v. H. F. BEEDE, Appellant.

ACTION FOR DECEIT—PROCUREMENT OF NOTE BY FRAUD—AGREEMENT AS TO USE OF PIANO—SUFFICIENCY OF COMPLAINT—RESCISSION.—In an action for deceit, a complaint alleging, in substance, that defendant, through his agent obtained permission to place a piano of latest pattern in plaintiff's house for exhibition to intending purchasers of such instrument, with an agreement that plaintiff might have the use of it for a year, with privilege of purchasing the same if desired, and obtained her signature to a note for four hundred dollars, payable in one year, with interest at ten per cent per annum, under a trick and fraudulent representation that she was signing a receipt for the piano containing the terms of the agreement, and that defendant delivered an old, wornout instrument of no value, whereupon plaintiff offered to return the piano and defendant refused to receive it, and negotiated the note to a bank, which had recovered judgment thereon, which plaintiff was compelled to pay, states a sufficient cause of action for the deceitful obtaining of the note for which plaintiff received no consideration and which was used to her damage, and it is not necessary to show a rescission of a sale, which did not in fact exist.

ID.—FRAUD OF ASSUMED AGENT—ADOPTION OF ACTS—LIABILITY OF DEFENDANT.—Where the evidence showed that one assuming to be defendant's agent obtained plaintiff's note fraudulently, and that plaintiff was compelled to pay the same, and that defendant, who was a son of the owner of the piano, and had authority from her to sell it for two hundred and twenty-five dollars, before the paper was signed by plaintiff ascertained that a bank would discount plaintiff's note, and prepared a note payable to himself in the sum of four hundred dollars, which the assumed agent of defendant then fraudulently obtained from plaintiff under the representation that defendant was the owner of the piano, and defendant then immediately discounted it to the bank, and disposed of the proceeds, paying the excess of price to the assumed agent, the jury were at liberty to infer that the defendant accepted the note as one obtained by his own agent, and if such agent was self-constituted, defendant having accepted the note from him, knowing that it had been executed in advance of the delivery of the piano, and for a sum largely in excess of the value, was put upon inquiry into the acts and representations by which such agent had procured the paper, and, not having made such inquiry, the jury might find that he meant to take upon himself, without further information, the risk of any misconduct by such agent, and to adopt all his acts.

ID.—AGENCY OF DEFENDANT IMMATERIAL — ASSUMPTION OF CHARACTER OF PRINCIPAL.—The fact that the defendant was himself the agent of his mother and did not personally profit by the fraud of his as-

sumed agent in obtaining the note, is immaterial, he having fully assumed in the supposed contract evidenced by the note the character of a principal, and allowed his assumed agent and the bank to treat him as such, and intended that plaintiff should regard him in that character.

ID.—PLAINTIFF NOT ESTOPPED BY BILL OF SALE, AND DELAY NOT INJURIOUS TO DEFENDANT.—The fact that defendant remitted a bill of sale of the piano executed by his mother to the plaintiff, and that plaintiff omitted for nine months to insist on defendant removing the piano from the house, does not estop nor conclude the defendant from disputing the sale, nor constitute a waiver of the fraud, as matter of law, the defendant not having in any way changed his position on account of her delay, and she having had the right, under the terms of the actual contract, to the use of the piano for one year.

APPEAL from a judgment of the Superior Court of Contra Costa County, and from an order denying a new trial. Joseph P. Jones, Judge.

The facts are stated in the opinion.

Hartley & Abbott, and W. S. Tinning, for Appellant.

R. H. Latimer, for Respondent.

BRITT, C.—1. Action for deceit. Verdict and judgment were for plaintiff. It was in substance alleged in the complaint that the defendant, acting by one Hutchings, his agent, obtained permission from plaintiff to place in her house a new piano of latest pattern in order that the same might be exhibited to intending purchasers of such instruments in the neighborhood; in consideration of which permission it was agreed that plaintiff should have the use of the piano for one year, with the privilege of purchasing the same within that time if she desired to do so. That on the solicitation of said agent plaintiff signed a paper which he represented and which she believed to be a receipt for the piano containing the terms of the said agreement. That a few days later Hutchings set up in the home of plaintiff (about fifteen miles distant from Antioch, in Contra Costa county, where defendant resided) a piano which she subsequently found to be an old, worn-out instrument of no value; that thereupon she demanded of defendant an inspection of the paper she had signed, and was then informed by him for the first time that she had purchased the piano and had given therefor the following note: "\$400. Antioch, November 4, 1892. One year after date

I promise to pay to H. F. Beede, or order four hundred dollars for value received, with interest at ten per cent per annum from maturity until paid. Mrs. Francis E. Wilder." That she signed but one paper relating to the piano, and that her signature to said note was procured by some trick or fraudulent device practiced by Hutchings when she thought she was signing a receipt for the piano as he represented to her. That she offered to return the piano to defendant, and he refused to receive it. That defendant transferred said note in due course to a certain bank, which latter sued plaintiff on the note after maturity thereof, and recovered judgment for the sum of \$348.15; that she paid such sum, and demands judgment against defendant in this action for the same amount.

There was no demurrer to the complaint, but defendant contends here that it stated no cause of action, in that it failed to show that plaintiff followed the course for rescinding a contract marked out in section 1691 of the Civil Code. The complaint shows, however, that the foundation of the action is the deceitful obtainment of plaintiff's promissory note, for which she received no consideration, and which was used to her damage; according to its allegations the execution of the note was no part of the actual contract; rescission of a contract of sale was not necessary to the maintenance of the action, for no such contract was made. There was much matter in the complaint which we have not set out, some of which might have been omitted to the great improvement of the pleading; possibly the complaint was ambiguous or uncertain—objections waived by failure to demur, but it stated a cause of action.

2. It is not disputed that the evidence sufficed to show that Hutchings obtained the note fraudulently, and that plaintiff was compelled to pay the same, substantially as charged in the complaint; but the defendant insists that the evidence disclosed no relations between Hutchings and himself to render him liable for the acts of the former. There was evidence that the piano belonged to one Lucia S. Beede, the defendant's mother, who was a member of his household, and it seems that defendant had authority from her to sell the same, at the price of two hundred and twenty-five dollars. Hutchings, in his negotiation with plaintiff, represented defendant to be the owner of the in-

strument, and the contract which he exhibited to her, and which she supposed herself to be executing purported to be made with the defendant. After plaintiff had agreed with Hutchings to receive the piano into her house, but before she had signed the paper, Hutchings, accompanied by defendant, went to the Bank of Antioch and ascertained that it would discount plaintiff's note. Hutchings then requested defendant to prepare the note described in the complaint payable to himself, H. F. Beede; the latter complied and passed the same to Hutchings ready for signature; this was on November 4, 1892. A day or two later Hutchings returned with the note signed by plaintiff; defendant immediately transferred it to the bank at twelve per cent discount, he receiving two hundred and twenty-five dollars of the net proceeds, and Hutchings the remainder. Of the sum so obtained by defendant he delivered two hundred and twenty dollars to said Lucia S. Beede, and used five dollars to pay expenses of shipping the piano to plaintiff. Plaintiff received the piano on November 8, 1892, and the next day she learned that the paper she had given to Hutchings was her promissory note, that it had been assigned to said bank, and that defendant considered the piano to have been sold to her; about the same time defendant—of his own motion, it seems from the evidence for plaintiff—sent to her by mail a bill of sale of the piano executed by his mother. In August, 1893, plaintiff notified defendant 'to come and get his piano.' She testified, 'We were hunting up as fast as we could to see what we could do about the case.' The value of the piano did not exceed seventy-five dollars. The evidence was conflicting as to some of the matters above stated, and there was much testimony besides, unnecessary to be here set out.

The defendant testified in a general way that he sold the piano to Hutchings, and if this were so it might be difficult to find in the evidence adequate ground for charging him with Hutchings' misdoing; but the particulars in proof did not sustain that view; the note showed on its face that it was a contract between plaintiff as payer and defendants as payee; it was discounted and the proceeds were divided between Hutchings and defendant before the piano was taken from the latter's house; the bill of sale made on defendant's procurement ran to plaintiff,

not Hutchings. Clearly, defendant acted on the assumption that through Hutchings the piano had been sold to plaintiff and that she had agreed to pay him, defendant, the sum of four hundred dollars for the same; in that form the transaction had his approval. It is not claimed that defendant believed, or had any reason to believe, that Hutchings was the agent of plaintiff; the jury were therefore at liberty to infer that he accepted the note as one obtained by his own agent. (Civ. Code, secs. 2307, 2310; *Allin v. Williams*, 97 Cal. 403, 407.) It is urged, however, that such ratification of the supposed sale involved no adoption of the fraud of Hutchings because defendant had not been informed thereof. But the defendant accepted the note from a self-constituted agent, knowing that it had been executed in advance of the delivery of the piano to plaintiff, and for a sum largely in excess of the value of the instrument; the circumstances made it his duty to inquire into the acts and representations by which such agent had procured the paper; he made no inquiry, and the jury might well find that he meant to take upon himself, without further information, the risk of any misconduct of Hutchings and to adopt all his acts. (*Busch v. Wilcox*, 82 Mich. 336, 340; 21 Am. St. Rep. 563; *Lewis v. Read*, 13 Mees. & W. 834; Mechem on Agency, secs. 128, 129. See *Veazie v. Williams*, 8 How. 157; *Pope v. Armsby Co.*, 111 Cal. 159.) Defendant's liability necessarily follows. (Civ. Code, secs. 2338, 2339; *Riser v. Walton*, 78 Cal. 490; *Wheeler etc. Mfg. Co. v. Aughey*, 144 Pa. St. 398; 27 Am. St. Rep. 638.)

It is immaterial that defendant was himself an agent and personally was not profited by the fraud. The relation he assumed to the supposed contract evidenced by the note was, from first to last, that of a principal; he allowed Hutchings and the bank to treat him as such, and intended that plaintiff should regard him in the same character. That he incurred toward her such liabilities as may be incident to that relation is too plain for argument. Nor is it of controlling importance in the case that plaintiff retained the bill of sale sent to her by defendant, and omitted for several months to require him to remove the piano from her house. While these facts had a tendency to show that plaintiff waived the fraud and would abide by the sale which defendant claimed to have been made, they were not conclusive.

By the terms of the actual arrangement with Hutchings, she was to have possession of the piano for one year if she so desired; she had no dealing with the person who executed the bill of sale; her note had been passed already to an innocent holder; and the defendant in no way changed his position on account of her delay. Waiver is commonly a question of fact; certainly it cannot be said here as matter of law that plaintiff waived the fraud. (*Russel v. Amador*, 3 Cal. 400, 402.)

Defendant complains of certain instructions given to the jury at plaintiff's instance. Portions thereof are transcribed from the complaint and contain matters of little or no pertinence to the case; but in our opinion the relevant parts of the instructions complained of were not erroneous, and those irrelevant were not prejudicial to defendant. The judgment and order denying a new trial should be affirmed.

Chipman, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

Henshaw, J., Temple, J., McFarland, J.

[S. F. No. 725. Department One.—January 21, 1898.]

In the Matter of the Estate of JOSE DE LAVEAGA, Deceased.
MARIA JOSE CEBRIAN et al., Appellants, v. A. G. M.
DE LAVEAGA, Respondent.

CONSTRUCTION OF WILL—SUBSTITUTED LEGACY—INCIDENTS AND LIMITATIONS OF ORIGINAL LEGACY—DEATH OF LEGATEE—CODICIL—REFERENCE TO ORIGINAL BEQUEST.—One of the rules for the construction of a will is that a substituted or additional legacy, although not so expressed in the testamentary instrument, is *prima facie* payable out of the same funds and subject to the same incidents and conditions as is the original legacy, irrespective of whether the result is or is not advantageous to the legatee; and this rule is to be applied where a legacy lapsed through the death of the legatee prior to the death of the testator, is bequeathed to a substituted legatee, in a codicil, if nothing appears from the language used in the codicil or from the application of other recognized rules for the construction of wills, to indicate that the testator intended a substantive and

independent bequest; and where the amount of the legacy is not specified in the codicil, otherwise than by reference to the original will, it cannot be so considered.

ID.—LAPSE OF TIME IMMATERIAL.—LEGACY PAYABLE OUT OF PARTICULAR PROPERTY.—The rights of a substituted legatee named in a codicil are not enlarged by lapse of time after the execution of the will establishing the original legacy; and where the original legacy is payable only out of the proceeds of sale of a particular piece of land, the substituted legatee is limited by the condition attached to the original legacy, notwithstanding the lapse of several years between the execution of the will and that of the codicil.

ID.—REVOCATION OF LIFE ESTATE BEQUEATHED TO SUBSTITUTED LEGATEE. The fact that a life estate in another parcel of land, before devised to the substituted legatee, was revoked, and devised to another person, cannot affect or enlarge the rights of the substituted legatee, where the language used does not indicate that the legacy was given in lieu of the life estate.

APPEAL from an order of the Superior Court of the City and County of San Francisco, directing payment of a legacy.
J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Timothy J. Lyons, and Van R. Paterson, for Appellants.

J. J. Dwyer, for Respondent.

HARRISON, J.—The will of the above-named decedent, bearing date February 1, 1886, and five codicils thereto executed by him at various dates thereafter—the last bearing date April 12, 1894—were admitted to probate in the superior court for the city and county of San Francisco, and letters testamentary issued to the executors named therein. In the original will the testator made certain pecuniary bequests, and by codicils thereafter made, the payment of all his money bequests was charged exclusively upon a certain rancho in San Benito county. One of these money bequests was a legacy of twenty thousand dollars given to William Brodersen, who died in the lifetime of the testator, and in his last codicil the testator made the following provision: "The amount I did bequest to my friend W. Brodersen, now deceased, I now desire, or rather ordain, be given to the young man, J. M. Laveaga, to whom I left my ranch in this state of Sinaloa, called Labor, but do so now no more, and I do

bequest said ranch to my cousin, Braulio Laveaga of San Dimas, Mexico." The legatee thus named is the respondent herein, and was formerly known by the name of J. H. Dohrmann, and in the original will the testator gave to him, "if he takes the name of Laveaga, my ranch in Mexico, Sinaloa, called La Labor, and all my rights and interest to lands adjoining, during his life, in trust only for his first male issue born in lawful wedlock, and, if none, then," etc. The money bequests made by the testator in his original will amounted to about two hundred and thirty thousand dollars, and the sale of the rancho out of whose proceeds their payment was to be made yielded to the estate only about ninety-eight thousand dollars. The respondent made application to the superior court for an order directing the executors to pay him the sum of twenty thousand dollars as the amount of said legacy, to which opposition was made by the executors, and also by certain heirs at law of the testator, the appellants herein, upon the ground that, as the property which the testator has exclusively charged with the payment of his money bequests was insufficient therefor, the applicant was entitled to only his proportion of that fund. The court, however, held that the legacy was a charge against the general assets of the estate, and made its order directing the payment to him of the sum of twenty thousand dollars. From this order the present appeal has been taken by the aforesaid heirs at law.

The real issue between the parties upon this appeal is, whether the legacy to the respondent is an independent bequest, or whether it is merely a substitute for the legacy previously given to Brodersen.

One of the rules for the construction of a will is that a substituted or additional legacy is *prima facie* payable out of the same funds and subject to the same incidents and conditions as is the original legacy; irrespective of whether the result is or is not advantageous to the legatee. (Hawkins on Wills, *306; Williams on Executors, *1162.) Mr. Redfield states the rule as follows (2 Redfield on Wills, *447): "Substitutionary legacies, that is, where legacies are subsequently given to come in the place of others given before, either in a former will, or where the substitutionary legacies are given in a codicil executed at a later date than the instrument by which the legacies

were given in the first instance—in all cases such substitutionary legacies, unless there is something in the terms used or the circumstances attending the substitution to the contrary, will have all the incidents, conditions, and limitations attaching to the original legacies.” Thus in *Leacroft v. Maynard*, 3 Bro. Ch. 233, the testator gave several legacies which he directed to be raised out of his real estate; among others, one of a thousand pounds to a hospital, which by the statute of mortmain was void. By a codicil he revoked this legacy, and instead thereof gave five hundred pounds to another hospital, without mentioning any source from which it was to be paid. It was contended that, as this legacy was given generally and without any limitations, it was payable out of the personal estate, but Lord Thurlow held that, as the codicil did not purport to change the fund designated in the will for the payment of legacies, it was void equally with the original legacy. In *Cooper v. Day*, 3 Meriv. 154, the testator, by a codicil, expressly revoked a legacy which in his will he had directed to be paid free of all legacy duty, and gave in lieu thereof a legacy of a greater amount without any provision respecting the legacy duty. The latter was held to be a substituted legacy, and exempt from legacy duty. The same ruling was made in *Earl of Shaftesbury v. Duke of Marlborough*, 7 Sim. 237, the vice-chancellor saying: “When the thing bequeathed by the codicil is given as a mere substitution for that which is bequeathed by the will, it is to be taken with all its accidents.” (See, also, *Bristow v. Bristow*, 5 Beav. 289; *Fisher v. Brierly*, 30 Beav. 267; *Johnston v. Earl of Harrowby*, 1 De Gex, F. & J. 183.) In *Condict v. King*, 13 N. J. Eq. 375, certain parcels of land had been devised to the testator’s grandson, with a limitation over to his daughters. The testator afterward sold the land, and by a codicil to his will bequeathed to the grandson a bond and mortgage taken for the purchase money in lieu of the land, but without any limitation thereof over to the daughters. The court held that the bond and mortgage were given as a mere substitution for the land, and that the executors of the grandson must account therefor to the daughters, saying: “The fact that there was an ademption of the gift by a sale of the land before the date of the codicil does not change the substance of the thing. He gave the bond and mortgage as a sub-

stitute for the land which was devised and subsequently sold by the testator. Where the legacy is given as a mere substitute for another, the substituted gift is subject to the incidents of the original, although not so expressed in the testamentary instrument." (See, also, *Barnes v. Hanks*, 55 Vt. 317; *Snow v. Foley*, 119 Mass. 102; *Warwick v. Hawkins*, 5 De Gex & S. 481.) The rule is established for the purpose of carrying into effect the intention of the testator, and is employed for that purpose in connection with other rules of construction. Unless it appears from the language used in the codicil, or from the application of recognized rules for the construction of wills, that the testator intended by the codicil to make a substantive and independent bequest, the rule is to be applied. The limitations and conditions which he affixed to the original bequest are presumed to be intended by him to follow it, irrespective of any change in its amount, or in the person to whom it is given. In the absence of some affirmative indication to the contrary by the language used for the later bequest, it will be deemed merely substitutionary and subject to all the incidents of that for which it is substituted.

The omission by the testator in the present case to specify the amount of the legacy to the respondent, and the reference made by him to the will for the purpose of determining this amount, takes from it the character of a substantive and independent legacy. He says: "The amount I did bequest to my friend, W. Brodersen, now deceased, I desire or rather ordain be given" to the respondent. The testator did not bequeath to the respondent any other or greater sum than "the amount which I did bequest" to Brodersen. Instead of saying "the sum of money named in my bequest to Brodersen," he carefully limits the legacy to him to the "amount" which he had bequeathed to Brodersen, and also, instead of saying "the amount of the legacy to Brodersen," he says the amount "which I did bequest" to Brodersen. The respondent is entitled to only the amount which had been bequeathed to Brodersen, and this amount is to be ascertained from the terms of the will in which it is given. By the terms of the will the "amount" of the legacy to Brodersen is made contingent upon the proceeds of the sale of the rancho in San Benito county. It is only such an amount as Brodersen would have received had he continued to be the beneficiary of

the legacy that the testator gives to the respondent, and that amount was indefinite and contingent upon the amount of the fund from which it was to be paid. In *Appeal of Buehler*, 100 Pa. St. 385, the testator in his will directed the residue of his estate to be divided equally among his children, with the proviso that there should be deducted from the share of each the amount of such advances as might have been made to him. He afterward by a codicil revoked this devise, so far as it applied to one of his sons, and gave the share of that son to his daughter in law. The court held that she was a substituted legatee for the son, and entitled to only so much of the estate as the son would have received, and should receive only such portion of a full share of the estate as would remain after deducting the advancements made to the son.

The rights of the respondent are not enlarged by the fact that the legacy is contained in a codicil executed several years after the will. The will and the codicils together constitute the testamentary disposition of the property, and are all to be considered for the purpose of arriving at the intention of the testator. In *Tilden v. Tilden*, 13 Gray, 103, the testator gave to one of his daughters, so long as she remained unmarried, the use of a portion of his dwellinghouse and gave the residue of his estate to his son, upon the condition "that he shall in all respects comply with what is enjoined upon him in this my last will and testament;" and, if he did not so comply, the estate so given him should be equally divided between the daughters of the testator. By a codicil, executed twenty-two years afterward, the testator gave to his daughter the use of other lots, and directed the son to keep "in good repair that part of the house of which the use had been devised to the daughter. There was no penalty or forfeiture named in the codicil for a failure on the part of the son to keep the house in repair, but the court held that the devise of the property to him in the original will, upon the condition that he should comply with what was enjoined upon him therein, included also what might be enjoined upon him by any codicil, and that his failure to repair the house after it had been destroyed by fire operated as a forfeiture of his estate, saying: "A codicil duly executed is an addition or supplement to a will, and is no revocation thereof, except in the precise degree in

which it is inconsistent therewith, unless there be words of revocation." (See, also, *Estate of Ladd*, 94 Cal. 670.) By the second and third codicils to his will the testator charged the rancho in San Benito county exclusively with the payment of his money bequests, and by his third codicil he recites and ratifies this provision of the will, and, as there is no revocation of this provision in either of the subsequent codicils, it must be held that his intention that the Brodersen legacy should be paid only out of the proceeds of the rancho extended also to the provision made for the respondent in the last codicil.

This conclusion is also corroborated by the internal evidence of the will itself. On the day that the testator executed the will he left San Francisco for Mazatlan. It is evident that his mind was occupied with the testamentary disposition of his property thus made, for it appears that three days after the execution of the will, while on this voyage to Mazatlan, he made a codicil materially affecting its provisions, so that the two instruments thus executed so near each other may be regarded as fully reflecting his views at that time. It is evident from the provisions of these two instruments that the scheme of his will was that only the proceeds of his San Benito ranch should be employed in the payment of whatever money bequests he might make, and that his lot on Market street in San Francisco, together with the residue of his estate, should be appropriated to a specific charity. The other portions of his will are devoted to a disposition of his property in Mexico, and to certain specific bequests of real and personal property in California. In the several codicils subsequently made by him this scheme is preserved—the changes made thereby being explanatory or correctory of the original will, in some instances revoking previous bequests or substituting other bequests for property which he had specifically devised, but had afterward disposed of—and he also makes disposition of property which had been subsequently acquired by him. By his original will he made a specific devise of a certain lot of land in Santa Cruz, and in his fourth codicil, after reciting that he is about to sell this lot, he gives to this devisee the sum of five thousand dollars in lieu thereof. In one of his codicils he made a specific devise of a lot on Coronado Beach, in San Diego county, and in the same codicil as the

above, after reciting that he had since sold this lot, he directs that his legatees receive "from my estate" the sum of three thousand dollars. It is evident that he intended these legacies to be substituted for the property previously given to the same legatees. When Balthasar Hefti, to whom he had given twenty thousand dollars, died, he revoked the legacy to him, without making any other disposition thereof in its place; but upon the death of Brodersen, instead of revoking the legacy to him, he directs that the "amount" which he had bequeathed to him be given to the respondent. In the second codicil he made certain additional money bequests, but in the next codicil, made only four days thereafter, he expressly confirmed his declaration that all money bequests should be paid out of the San Benito rancho, and in none of the subsequent codicils is there any revocation of this provision, or any language implying an intention to revoke the limitation thus created.

The language used by the testator in giving the amount of the Brodersen legacy to the respondent does not indicate that it was given to him in lieu of the life estate in the rancho in Sinaloa previously given to him. That bequest was expressly revoked, and the testator made an entirely different disposition of the rancho, while the bequest of the Brodersen legacy is in terms which clearly indicate his intention merely to substitute the respondent as its recipient in the place of Brodersen.

The order is reversed.

Van Fleet, J., and Beatty, C. J., concurred.

[S. F. No. 595. Department One.—January 21, 1898.]

E. W. BUSHNELL, Respondent, v. A. M. SIMPSON, Appellant.

CORPORATIONS—SERVICES OF PRESIDENT — AMOUNT OF COMPENSATION—CONFLICTING EVIDENCE—APPEAL.—In an action involving a dispute as to the amount of compensation which the president of a corporation was entitled to receive for his services rendered to the corporation, a finding in favor of the amount claimed by him, based upon the terms of his original employment by the corporation, and upon

his testimony that those terms continued in force during his employment, cannot be disturbed upon appeal, upon the ground that his testimony was contradicted by evidence that he agreed with the principal stockholder to take less compensation.

ID.—ASSUMPTION OF DEBTS OF CORPORATION — EVIDENCE — PRIVATE BOOKS OF ACCOUNT OF PRESIDENT—BALANCE TO BE DEDUCTED FROM SALARY.—In an action by the president of a corporation to recover the balance of salary due him from the corporation against a defendant to whom the property of the corporation had been transferred, and who had assumed to pay its debts, where the plaintiff, after having introduced the records of the corporation to show the amount of salary agreed to be paid him, had testified that he had performed the duties of that office until the transfer was made to the defendant, that during that time he had paid out money for the corporation, and had purchased coal from it, and drawn money from it in various amounts, and that he had kept a book in which all accounts between him and the corporation were entered, including his salary as president, such book is admissible in evidence where the only objection made to it is that the books of the company are the proper books to be offered in evidence; and though it could have no weight in determining the amount of salary he was to receive under express contract with the corporation, yet it was proper and material to show the other items of account and what balance was to be deducted from the salary due him.

ID.—HARMLESS RULING—CORPORATION BOOKS.—Where the corporation books were afterward introduced in evidence, and no disagreement was at any time pointed out between the private books of account of the president and those of the corporation, the reception of the books of account kept by the plaintiff cannot be said upon appeal to have caused the defendant any injury.

ID.—IMPROPER CROSS-EXAMINATION—ASSUMPTION OF FACTS NOT PROVEN. Where the plaintiff was asked by the defendant upon cross-examination how it was that everybody went to the defendant to fix those salaries, and it appeared that it was not proper cross-examination, and it did not appear in evidence that any persons went to the defendant to fix their salaries, but the question assumed facts that did not appear, an objection to the question based upon each of those grounds is properly sustained.

ID.—COUNTERCLAIM—ACCOUNT STATED—FAILURE OF EVIDENCE — FINDING.—Where the real controversy between the parties was as to the amount of compensation which plaintiff was entitled to receive for his services, and there was no dispute as to the balance of other accounts to be deducted from the amount of salary to be received by him as president of the corporation, a finding in favor of the plaintiff for the amount claimed is a finding against a counterclaim upon an account stated between plaintiff and the corporation, and where there is no evidence that a final balance of account, including the salary, was stated between the corporation and the plaintiff, the counterclaim cannot be sustained.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. J. C. B. Hebbard, Judge.

It was shown on behalf of the plaintiff, that, prior to his election as president, the corporation had, by a resolution of its board of directors, fixed the compensation of the president at one hundred and fifty dollars per month, and that no change therein had been made by the corporation. Evidence was adduced for the defendant that when the plaintiff was elected there was an understanding between plaintiff and defendant, who was the principal stockholder of the corporation, that his salary was to be only one hundred dollars per month. The plaintiff denied this agreement. Further facts are stated in the opinion of the court.

Brewton A. Hayne, for Appellant.

George W. Schell, and J. J. Scrivner, for Respondent.

HARRISON, J.—The Renton Coal Company was organized as a corporation under the laws of this state in 1874, and carried on the business for which it was incorporated until January 20, 1894. At that date an agreement was entered into between it and the defendant herein by which the corporation assigned and transferred to the defendant certain real and personal property, and the defendant in consideration thereof assumed and agreed to pay all the indebtedness and obligations of the corporation then existing. The plaintiff was elected president of the corporation December 23, 1885, and continued to act as its president until it went out of business as above stated. The present action was brought to recover the amount claimed by him to be due for his services as such president. The cause was tried by the court without a jury and judgment rendered in his favor, from which and an order denying a new trial the defendant has appealed. The controversy between the parties centers chiefly upon the rate of compensation which the plaintiff was entitled to receive—the plaintiff claiming that he was entitled to one hundred and fifty dollars per month, and the defendant that his compensation was to be only one hundred dollars per month.

From its decision in favor of the plaintiff, it is manifest that the court found that he was entitled to one hundred and fifty dollars per month, and the brief on behalf of the appellant is directed chiefly to showing that this finding is contrary to the evidence.

Under this issue between the parties the finding of the court was upon conflicting evidence. The court was at liberty to give credit to all the statements of the plaintiff, and, if it accepted his testimony as correct, its finding cannot be disregarded, even though there was other testimony in contradiction thereof.

After the records of the corporation showing the amount of salary fixed for the president, and the election of the plaintiff to that office, had been introduced, the plaintiff offered himself as a witness, and testified that he had performed the duties of president from the time of such election until the time of the aforesaid agreement with the defendant; that during that time he had paid out money for the corporation, for which he had rendered it vouchers, and had also had personal transactions with it on his own account, and had purchased coal from it for his personal use, and drawn money from it at various times in different amounts. He also testified that he had kept a book in which these various items were entered, and in which he had also entered the charges for his services as president. The pages of the book, in which was kept this account showing these various charges and credits, were then offered in evidence, to which the defendant objected upon the ground that "the books of the company are the proper books to be offered in evidence in this case." The court overruled the objection and admitted the evidence, to which the defendant excepted.

At the time when parties to an action were not competent witnesses in their own behalf, their books of account were admitted in evidence upon a proper showing of the mode in which they had been kept, and were treated as original evidence of the matters for which they were introduced; but, since parties have been allowed to testify concerning all the facts for which the books were formerly offered, their testimony in reference thereto constitutes primary evidence of these facts, and the books of account become merely secondary or supplementary evidence. The books are not excluded as incompetent, but will be received,

either in corroboration of the testimony of the parties as entries made at the time, or upon the principles by which inferior evidence is received where the party is unable to produce evidence of a higher degree. (See *Roche v. Ware*, 71 Cal. 375; 60 Am. Rep. 539; *White v. Whitney*, 82 Cal. 163.) The defendant did not object to the introduction of the book on the ground that it had not been correctly kept, or that the book was not a shop book, or was not of a character which would render it admissible, or that it was only secondary evidence of the facts shown by it, or that the matters shown thereby did not tend to establish the plaintiff's claim, his only objection being that "the books of the company are the proper books to be offered in evidence in this case." The plaintiff's book could have no weight in determining the amount of salary which he was to receive, as his claim to this salary is based upon an express contract, and, although the time-book kept by a laborer is competent as evidence of the days upon which he has worked (*Mathes v. Robinson*, 8 Met. 269; 41 Am. Dec. 505), there was no dispute in the present case about the length of time that the plaintiff had served as president. The book, however, showed the items of the various credits for coal and money received by the plaintiff from the corporation, and was proper and material for the purpose of fixing the amount to be deducted from the salary claimed by him; and, as the appellant has not pointed out any particular in which this account in these respects varies from the account kept by the corporation, and which was afterward introduced in evidence, its reception by the court cannot be said to have caused him any injury.

While the plaintiff was on the stand he was asked by the defendant "Now, how is it that everybody went to Captain Simpson to fix these salaries?" This question was objected to by the plaintiff on the ground that it was not cross-examination, and upon the further ground that it did not appear that anybody went to Captain Simpson to fix their salaries, and that it was assuming facts that did not appear. The objection was sustained, and this ruling is assigned as error by the appellant. The ruling of the court was correct upon each of the objections to the question made by the plaintiff.

The defendant pleaded in his answer a counterclaim against

the plaintiff for the sum of six hundred and twenty-three dollars and sixty-three cents, upon an account stated between the plaintiff and the corporation, for goods sold and delivered and moneys paid by it to him, and by the corporation assigned to the defendant on the 20th of January, 1894. Upon this issue the court found in favor of the plaintiff.

The real controversy between the parties, as has been stated above, was the amount of salary to which the plaintiff is entitled, and the counterclaim of the appellant is the balance shown by the books of the corporation upon the basis of allowing the plaintiff a salary of only one hundred dollars a month. The finding of the court in favor of the amount claimed by the plaintiff necessitated its finding against this counterclaim. The evidence fails to support the appellant's claim that there was an account stated between the corporation and the plaintiff at that date, and the appellant has not contended in his brief that, if the plaintiff was entitled to one hundred and fifty dollars per month, there is any evidence in support of the counterclaim.

The judgment and order are affirmed.

Van Fleet, J., and Beatty, C. J., concurred.

Hearing in Bank denied.

[Sac. No. 288. Department One.—January 22, 1898.]

In the Matter of the Estate of P. A. STRONG, Deceased;
MARY F. FOWLER, Respondent, v. W. B. MILLER, Ad-
ministrator, Appellant.

ESTATES OF DECEASED PERSONS—RIGHT OF ADMINISTRATION—TRANSFER OF TITLE BY HEIRS—IMPROPER REVOCATION OF LETTERS.—The heirs of a deceased person, who died without debts, or other estate, cannot, by consent that there shall be no administration of real property belonging to the decedent, and by transfer of their title in such real estate, dispense with the rights of administration thereupon; and where letters of administration upon such real property were granted to the public administrator six years after the death of the decedent, the court cannot revoke his letters and set aside the proceeding for administration, because of such agreement and transfer on the part of the heirs, and upon the ground that there was no occasion for administration upon the said estate.

ID.—STATUTORY CONSTRUCTION—OBJECT OF ADMINISTRATION—PROBATE PROCEEDINGS STATUTORY AND SPECIAL — JURISDICTION — IMPROPER DISMISSAL—RIGHTS OF ADMINISTRATOR.—The whole subject matter of dealings with the estates of deceased persons is one of statutory regulation, and the policy and intent of the statute is to subject estates of deceased persons to administration, for the purpose of ascertaining and protecting the rights of creditors and heirs and properly transmitting the title of record, and there is no other method of conclusively determining the existence or nonexistence of heirs or creditors; and the proceedings for administration being statutory and special in their nature, the jurisdiction of the superior court over them is circumscribed by the provisions of the statute conferring such jurisdiction, and it cannot competently proceed in a manner essentially different from that provided by statute, nor dispense with further proceedings nor deprive the administrator of his right to compensation and reimbursement of costs and expense of administration by an order setting aside and dismissing the proceedings.

APPEAL from an order of the Superior Court of Sacramento County revoking letters of Administration, and setting aside and dismissing all proceedings thereunder. Matt F. Johnson, Judge.

The facts are stated in the opinion of the court.

C. H. Oatman, for Appellant.

A. L. Hart, for Respondent.

THE COURT.—The respondent, Mary F. Fowler, in May, 1896, filed a petition in said estate, the material averments of which were in substance that said decedent died in the state of Washington in 1890, intestate, without any debts, and leaving no estate except a certain described piece of real estate in the county of Sacramento, in this state; that he left as heirs four adult children, all of lawful age, of whom petitioner was one; that by mutual consent of said heirs no administration was taken out upon said estate, but that after the death of said intestate, and before the grant of letters hereinafter mentioned, the others of said heirs conveyed all their right, title, and interest in said property to the petitioner, who took possession and control thereof, and has since occupied the same.

That in March, 1896, W. B. Miller, the appellant, as public administrator of said county of Sacramento, regularly applied for and was granted letters of administration upon the estate of

said deceased, and has since been proceeding to administer upon said estate; that an inventory and appraisement was filed by said administrator, and thereafter an application was made for an order to sell the said real estate to pay the expenses of administration, which application, after proceedings duly and regularly had therefor, was granted, and an order made for the sale of said property, and that in pursuance of said order the administrator was proceeding to advertise and sell the same, and would make such sale unless restrained by the court. It is then alleged that the petitioner "is informed and verily believes that there was no necessity for administration upon the said estate," and that the said administrator "has procured the said letters of administration solely and only for the purpose of deriving to himself the fees which may be allowed him by law, and without respect to the interests of said estate, or the interests of your petitioner." The prayer was that the administrator be required to show cause why his letters and all proceedings thereunder should not be vacated and set aside, and that the contemplated sale be stayed until the final determination of the petition.

The administrator demurred to the petition as stating no cause for relief, which demurrer was overruled and an answer filed, upon which the matter was tried. The court found the facts in all essential respects as alleged in the petition, and, concluding as matter of law, that there was no occasion for administration upon the said estate, made an omnibus order vacating and setting aside its order appointing the administrator, revoking his letters, setting aside the order of sale of real estate, and generally all other orders and proceedings in the estate, and directing that the administration upon the said estate cease and determine, and awarding costs of the proceeding against the administrator. From this order the appeal is taken.

The facts alleged and found are clearly insufficient to warrant the action taken by the court below. Whatever the law may be in other jurisdictions, there is nothing in our probate law which would, either expressly or by implication, exempt the property of this estate from the requirement of administration. The whole subject matter of dealing with the estates of deceased persons is one of statutory regulation, and the policy and intent of our statute very clearly contemplates that property of decedents

left undisposed of at death (except in the instance of the homestead, acquired under certain circumstances as provided for in section 1474 of the Code of Civil Procedure) shall, for the purposes of ascertaining and protecting the right of creditors and heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court. Indeed, there is no other method provided by the statute whereby the existence of creditors or heirs of decedents may be conclusively established. And such administration may be initiated and had at the instance of any person entitled under the law to administer upon the estate. That the appellant was entitled to the grant of letters in this instance cannot be questioned in this proceeding. The court had jurisdiction to make such grant, and it is alleged in the petition and found by the court that upon the application for letters "such proceedings were thereafter duly and regularly had in said superior court that on the fifth day of March, 1896, by an order duly made and regularly entered, the said superior court appointed the said W. B. Miller the administrator of the said estate, and that he ever since has been, and now is, as such public administrator and under said order, proceeding to administer upon said estate." That order, until reversed or set aside by some proper method, is conclusive upon appellant's right to administer said estate. The fact that it is averred in the petition herein and found by the court that Miller alleged in his petition for letters that the heirs of deceased were unknown, whereas in fact the respondent, "at the time of the filing of said petition and for more than four years prior thereto, was in open and notorious and exclusive possession" of the real estate involved, does not affect the validity of that order. Conceding that fact to be jurisdictional, it was one upon which the superior court was required to pass in the granting of letters, and as against this collateral attack its order is conclusive in favor of the existence of all the necessary facts required to sustain said order.

Administration upon the estate having been legally initiated, appellant acquired a right to proceed therewith until removed in some manner and for some cause provided by the statute, of which this is not one. Probate proceedings being purely statutory, and therefore special in their nature, the superior court,

although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided. (*Smith v. Westfield*, 88 Cal. 374, 379.) In any proceeding authorized by the law for his removal, appellant would have been protected in his right to be reimbursed for his proper and necessary costs and expenses paid out or incurred, and to compensation for services rendered in the administration—of which, by the present order, he is not only wholly deprived, but is even mulct in damages, by being required to pay the costs of this proceeding.

Moreover, and aside from the mere rights of appellant in the premises, the court having assumed jurisdiction of the estate in a proper case, was without power to thus summarily dispense with the further administration of the estate and refuse to further proceed therein. The case in this respect is not different in principle from that of *In re Pina*, 112 Cal. 14, where the administration had become vacant through the removal of the administrator, and an application for letters upon the estate was refused by the court below, apparently upon the ground that there was no necessity for further administration for the reason that the heirs had parted with all their interests in the property of the estate, and there was no desire by their grantees of any further administration therein. This action of the court was reversed, and it was there said: "We know of no such authorized method under the law of dispensing with the usual and ordinary administration of an estate of a deceased person, or of thus determining the question of title to real property as between an estate and persons claiming adversely to it. Under the facts appearing, it was the duty of the court to proceed and appoint an administrator with the will annexed, to complete the administration."

For these reasons the order appealed from must be reversed, and it is so ordered, same to be entered *nunc pro tunc* as of the thirtieth day of June, 1897.

Hearing in Bank denied.

[Crim. No. 329. Department Two.—January 25, 1898.]

THE PEOPLE, Respondent, v. JAMES B. COLON, Appellant.

CRIMINAL LAW—APPEAL—ABSENCE OF NOTICE FROM TRANSCRIPT—CERTIFICATE OF CLERK—DISMISSAL.—Where the transcript on appeal in a criminal case, contains no copy of the notice of appeal, and does not show that any notice of appeal was served, the clerk merely certifying that the transcript sets forth true copies of the information, etc., "and also of the notice of appeal duly filed herein," there being nothing in the record to show from what the appeal was taken, or that the notice was served upon the attorney for the adverse party, the appeal cannot be considered, and must be dismissed.

APPEAL from a judgment of the Superior Court of Solano County and from an order denying a new trial. A. J. Buckler, Judge.

The facts are stated in the opinion.

Coghlan & Harvey, for Appellant.

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

BELCHER, C.—The defendant was convicted of the crime of grand larceny, charged to have been committed on the eighth day of June, 1897, in the county of Solano, by feloniously stealing, taking and carrying away from the person of one Charles Miller the sum of thirty-six dollars, lawful money of the United States. He moved for a new trial, upon the ground that the evidence was insufficient to establish his guilt beyond a reasonable doubt, and his motion was denied. Thereupon the court pronounced judgment that he be imprisoned in the state prison at Folsom for the period of one year.

In the transcript presented here no copy of any notice of appeal, is set out, and the only reference to any such notice is that found in the certificate of the clerk of the court below attached to the transcript, in which he certifies "the foregoing to be full, true, and correct copies of the information," etc., "and also of the notice of appeal duly filed herein."

As the record contains no copy of any notice of appeal, and as it cannot therefore be seen from what the appeal was taken,

or that the notice was ever served upon the attorney of the adverse party, the attorney general suggests that there is nothing before this court for its consideration, and asks that the appeal be dismissed.

Section 1240 of the Penal Code provides: "An appeal is taken by filing with the clerk of the court, in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party."

In *People v. Phillips*, 45 Cal. 44, it did not appear that any notice of appeal was filed or served, except by a recital in the bill of exceptions, in which it was stated that "a notice of appeal had been duly given." It was held that "a recital in a bill of exceptions that a notice of appeal has been served and filed is no evidence that an appeal has been taken," and it was ordered that the submission be set aside and the cause stricken from the calendar.

In *People v. Bell*, 70 Cal. 33, it is said: "The transcript herein does not show that the notice of appeal was served on anyone. The law requires that it shall be served on the attorney of the adverse party (Pen. Code, sec. 1240), and the transcript on appeal must show it. (Citing *People v. Phillips supra*, and *People v. Clark*, 49 Cal. 455.) This not being the case, the appeal cannot be considered."

In view of the foregoing authorities the appeal in this case cannot be considered. It should therefore be dismissed.

Haynes, C., and Britt, C., concurred.

For reasons given in the foregoing opinion the appeal is dismissed.

Henshaw, J., McFarland, J., Temple, J.

[L. A. No. 339. Department One.—January 27, 1898.]

JOSEPH C. HEARNE, Respondent, v. M. H. DE YOUNG et al., Appellants.

LIBEL—JUSTIFICATION—IMMATERIAL VARIANCE—PROOF OF CHARGE.—A defendant in an action of slander or libel is not required to justify every word of the defamatory matter, but it is sufficient if the substance, gist, or sting of the libelous charge be justified, and immaterial variances and defects of proof upon minor matters are to be disregarded if the substance of the charge be justified.

ID.—DIVORCE FOR EXTREME CRUELTY—VARIANCE AS TO ACTS OF CRUELTY PUBLISHED—EVIDENCE OF OTHER VIOLENT ASSAULTS.—Where, in publishing a report of the proceedings had in an action for divorce upon the ground of extreme cruelty, in which a decree for the plaintiff had been granted, it was stated that at the trial evidence was introduced showing that the defendant in the divorce suit, who was plaintiff in the libel suit, was a man of most ungovernable temper, and that such incidents as the hurling of dishes at his wife when engaged in argument were referred to by the witnesses for the prosecution, the sting or gist of the charge is that he had assaulted his wife with force and violence, and the hurling of dishes or the fact of argument need not be proved, but evidence of other assaults of any kind upon the wife by the use of force and violence is admissible and sufficient to prove justification of the libel, the manner of the assault, and the means used in making it being mere matters of detail, not material to the substance of the libel.

ID.—EVIDENCE—SECOND PUBLICATION AFTER SUIT BROUGHT—QUESTION OF MALICE.—In an action of libel evidence of a second publication made after suit brought, in support of the same charge, may be given as tending to prove malice in the original publication, and the fact that there may be statements in the second publication looking toward other matters furnishes no reason for rejection of the article as competent and material evidence.

ID.—UNDERSTANDING OF READERS INADMISSIBLE.—Where it does not appear that the readers of a publication alleged to be libelous knew anything of the parties or of the circumstances save what they gathered from the publication, and thus stand in the same position with reference to the publication as the jurors, evidence as to the understanding of such readers as to the meaning of the publication is inadmissible.

ID.—COMMON IMPORT OF WORDS—PROVINCE OF JURY.—The common import of the words of a published article must be applied to test its libelous character, the publishers' intentions are to be gauged by such import, and the reader's understanding of it must be based upon such import; and it is the sole province of the jury to declare its import from the words used.

ID.—EVIDENCE—JOINT ACTION—DECLARATIONS OF CORRESPONDENT—EXPRESS MALICE—INSTRUCTIONS—DAMAGES.—In a joint action

against a publisher of a newspaper and a correspondent, who may be said to be an agent of the publisher, evidence is admissible to show statements made by the correspondent after the publication of the alleged libelous article, for the purpose of proving express malice on his part, there being evidence to show a repetition of the libel on the part of the publisher for the same purpose as against him, and the jury being properly instructed that subsequent declarations or publications made by one defendant are not admissible against the other, but that to authorize exemplary damages actual malice of each defendant must be shown, and that there can be no recovery in the joint action except of the lowest amount of damages to be assessed against either of them.

1D.—CHARGE OF CRIME—PROOF OF JUSTIFICATION — PREPONDERANCE OF EVIDENCE.—Where the libel published charges upon plaintiff the commission of a crime, it is not necessary that the commission of the crime be proved beyond a reasonable doubt, but a preponderance of evidence is sufficient to establish a justification.

APPEAL from a judgment of the Superior Court of San Diego County and from an order denying a new trial. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

Lloyd & Wood, William J. Hunsaker, and J. S. Callen, for Appellant.

E. W. Hendrick, Works & Works, and Herbert Peery, for Respondent.

GAROUTTE, J.—This is an appeal from a judgment based upon the verdict of a jury awarding to the plaintiff, and jointly against both defendants, the sum of ten thousand dollars damages for the publication in the *San Francisco Chronicle* of an alleged libel. The appeal is also prosecuted from an order denying a motion for a new trial. The defendant De Young was the proprietor and publisher, and the defendant Blunt was the San Diego City correspondent, of the paper. The article in question was written by Blunt and forwarded to San Francisco, where it was published without the knowledge of De Young.

The article deals with two occurrences, happening at different times and different places. It opens with a statement of fact that in an action for divorce, brought by the wife of the plaintiff upon a complaint charging extreme cruelty and failure to provide, a decree had been rendered in her favor. Among other

things, the article recited the following: "At the trial, evidence was elicited showing the doctor to be a man of most ungovernable temper, the use of profane and abusive language being one of the offenses charged, but such incidents as the hurling of dishes at his wife when engaged in arguments, were referred to by witnesses for the prosecution." In the second part of the article is found an epitome of the facts concerning the murder of Amos J. Stilwell at Hannibal, Missouri, on the night of December 28, 1888; the article stated that these facts were taken from newspapers published at Hannibal and Kansas City at the time of the murder.

The complaint, after quoting the aforesaid extract from the article pertaining to the divorce proceedings, declares: "That said allegation was false and defamatory; that it was not true that plaintiff ever hurled dishes at his wife when engaged in argument, or at any other time, nor did witnesses or any of them who gave testimony at such trial, testify that plaintiff ever hurled dishes at his wife." A portion of the article referring to the murder of Stillwell is as follows: "That robbery was not the motive was evident from the fact that nothing of value had been taken. The ax was one belonging to the place, and had been observed a day or two previous by servants near the front door steps in the yard. Dr. Hearne was the family physician, and one of the first to reach the house and assist in waking the servants." Referring to that portion of the publication relating to the murder of Stillwell, the complaint charges: "That the defendants meant thereby, and persons reading said article understood that defendants meant thereby, that this plaintiff had been guilty with other persons of murdering, or of assisting in the murder of, the said Stillwell, the former husband of his wife. And plaintiff alleges that said publication was false and defamatory in this, that it is not true that he had murdered said Stillwell, nor that he assisted in said murder, nor is it true that he had any knowledge of said affair; nor is it true that he was one of the first to reach the house, and it is not true that he assisted in waking the servants."

Defendants filed separate answers, each alleging as to that portion of the publication bearing upon the divorce proceedings: "That the publication aforesaid was a fair and true report with-

out malice, of a judicial proceeding, and of matter said in the course thereof and this defendant alleges and avers that the same was and is privileged." As to that portion of the publication referring to the murder of Stillwell, defendants, by their respective answers, deny "that this defendant meant thereby, or that persons reading said article understood that defendant meant thereby, that the plaintiff had been guilty with other persons of murder, or of assisting in the murder of said Stillwell, the former husband of plaintiff's wife." Defendants also deny that said publication was false or defamatory, and allege that it was made without malice.

At the trial defendants failed to establish that witnesses in the action of divorce testified that "such incidents as the hurling of dishes at his wife when engaged in argument" occurred. But in support of the truth of that part of the publication defendants offered evidence to the effect that at the trial of the action for divorce the wife, as a witness, testified as follows: "When I received a telegram he would take that and the envelope and poke them in my mouth so I could not breathe, and then give me chloroform." "He took me to the third story of our house and locked the door and told me with terrible oaths that he would kill me, and with that he pinched my arm black and blue from the shoulder to the elbow." "I tried to make him stop, but he would not, and he picked me up and threw me against the foot of the bed so that my limbs were black and blue for weeks after that." "He took his hand and knocked me down on the floor." "During the time this contention was going on he put a pistol in my ear and threatened to shoot me." "He abused me and cursed me and knocked me out of the public hallway with curses." "If I happened to be in his way, or could not entertain him as much as he thought I ought to, he would beat me again." This evidence, under objection of plaintiff's attorney that it did not tend to prove the truth of the charge, was not allowed to go to the jury, and error upon the part of the court in so ruling is the first question before us.

It is well settled that a defendant is not required in an action of slander or libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified. Immaterial variances and

defects of proof upon immaterial matters go for nothing, and, if the gist of the charge is established by the evidence, the defendant has made his case. The defendant should be held to a strict accountability for all injury inflicted upon the wronged party; at the same time there is no sound reason to support the proposition that a defendant must prove literally the truth of his publication. It may be said that modern authority has adopted a more liberal rule as to this principle than was applied by the courts in the ancient past. Indeed, there seems to be but little difference between counsel here as to the true doctrine at the present time. The serious trouble arises upon the application of that doctrine. The textwriters substantially agree as to the true rule, and it is well stated by Sutherland on Damages, volume 3, page 2626: "A plea of justification is sustained by justifying so much of the defamatory matter as constitutes the sting of the charge. It is unnecessary to repeat and justify every word of the alleged defamatory matter, if the substance of the charge be justified. If the substantial imputations be proved true, a slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently than the actual truth would." It is not the mere fact that a difference exists between the published report of the proceeding and the proceeding as it actually occurred, that determines the presence of the libel, but rather, is the difference of a substantial character, and does it produce a different effect?

What is the sting, the gist, the substance of the libel in the article before us? The publication declared that plaintiff had been sued for a decree of divorce, upon the ground of extreme cruelty, and the decree granted. It further stated that at the trial evidence was introduced showing the plaintiff to be a man of most ungovernable temper, and that such incidents as the hurling of dishes at his wife, when engaged in argument, were referred to by the witnesses for the prosecution. It certainly is no part of the sting or gist of the libel that he hurled the dishes at his wife *when engaged in argument*. If the dishes had been hurled by him in sullen silence, the same sting would have been there. Again, it is no part of the sting or gist of the libel that

he hurled *dishes* at his wife when engaged in argument. The same sting would still be there if the articles hurled had been knives or forks, or even chairs. Again, it is no part of the sting or gist of the libel that he *hurled* dishes at his wife when engaged in argument. The same sting would still be there if he had not hurled the dishes at his wife, but had simply held them in his hand, and, thus holding them, had assaulted her with them. Hence, it appears that neither the fact that the weapons used were dishes, nor that the weapons were hurled, nor that the plaintiff was engaged in argument at the time the weapons were hurled, nor all of these things taken together, form the sting of the libel.

The manner and means used by the plaintiff, as set forth in the publication, are nonessentials in forming the sting of the charge. The sting, the hurt to the plaintiff, is found in the fact that he is charged in the publication by the evidence with having assaulted his wife with force and violence. That is the substance of the libel. The substantial imputation against plaintiff is the evidence of a violent assault upon his wife. The manner of the assault and the means used in making it are mere matters of detail; and statements in that regard do not change the complexion of the affair in any degree to plaintiff's disadvantage in the mind of the reader. Substantially stated, the charge here is that the plaintiff assaulted his wife by hurling dishes at her. Testimony at the divorce trial of an assault of any kind upon his wife, by use of force and violence upon the part of the plaintiff, would prove the charge.

It may be said that the early cases in this country have declared the doctrine to be that the justification should be as full and exact in detail as the charge. (*Torrey v. Field*, 10 Vt. 353.) But in *Boogher v. Knapp*, 97 Mo. 122, it is said: "The report is fair and impartial so far as the plaintiff is concerned, if a *verbatim* report of the proceedings would have the same effect on his character as the report made. The only interest the plaintiff has in the accuracy of the report is that it shall be so far accurate as not to be more injurious to him than a *verbatim* report would be." Possibly, this doctrine is too broadly stated in favor of a defendant. Certainly we are not called upon to apply such a test here in order to support a justification of the truth of

this charge. In *Vail v. Anderson*, 61 Minn. 552, the article charged plaintiff with having committed an assault with intent to do great bodily harm. It was alleged that the plaintiff committed the assault by thrusting a pitchfork into the thigh of one McClintock. The publisher was held to have justified the truth of his publication, even though he failed to show that the pitchfork penetrated McClintock's thigh, the court holding that an actual wounding was not necessarily involved in the sting of the charge. In the case of *Snow v. Witcher*, 9 Ired. 346, the charge was made that the plaintiff, an unmarried female, "had lost a little one." This charge was held justified by plea and proof that the plaintiff was an unchaste woman. The court declared the sting of the charge was the act of criminal intercourse indirectly declared to have been committed by the plaintiff. In view of what has been said, it is apparent that the evidence offered by defendants should have been admitted as tending to support the truth of the charge, and should have gone to the jury as bearing upon that issue. The rule we have declared has no direct precedent in this state, for here the question is a new one, but it is a rule agreeable to reason, as rendering to both sides of the litigation full and complete justice.

It is insisted that the court erred in allowing plaintiff to introduce in evidence "a publication of a different nature from the one complained of, and made at a time subsequent to the commencement of the action." In answer to the first branch of this contention, upon a comparison of the two publications we are not prepared to say that they were so dissimilar as to defeat the introduction of the second in evidence as tending to prove malice. If the first publication will support the construction that by it plaintiff is charged as a *particeps criminis* in the murder of Stillwell, then the second publication will support that charge; and, while there may be statements in the second article looking toward other matters, such fact furnishes no reason for the rejection of the article as competent and material evidence in the case.

Was it error to admit the second publication in evidence, it having been made subsequently to the commencement of the action? The law is not at all settled in this country upon the question. Many very reputable courts have divided as to the

true rule. Mr. Justice Rapallo, in *Frazier v. McCloskey*, 60 N. Y. 338, 19 Am. Rep. 193, attempts upon reason to show why publications made subsequent to the commencement of the action stand upon different ground as to the law from those made prior to the commencement of the action and subsequent to the publication upon which the libelous charge is based. When we consider that these publications are only admissible for the single purpose of proving malice actuating the defendant in the original publication, it is difficult to see substantial reasons why the commencement of the action should be a bar to the admission of publications made thereafter; but, whatever may be the rule in other jurisdictions, in this state we deem the matter settled by the adjudications. In *Norris v. Elliott*, 39 Cal. 72, this court thus declares the rule: "Nor did the court err in admitting proof that the slanderous words were repeated after the action was commenced. This proof was offered and admitted only as proof of malice, and was competent for that purpose." It is also said in *Chamberlin v. Vance*, 51 Cal. 84: "The words testified to by the witness were spoken after the commencement of the action, but, as they were substantially the same as those declared on, they were admissible to prove the *quo animo* with which the alleged slander was originally published. The words spoken after were of similar import to those spoken before this action was brought. They may be considered a repetition, and so were admissible on the question of malice." In speaking to the issue of malice, we find the following pertinent language used in *Harris v. Zanone*, 93 Cal. 59: "Upon this issue the plaintiff was at liberty to introduce any competent evidence of express malice, as fully as though it had been alleged in her original complaint and denied in the answer of the defendant; and other utterances of words of similar import would be competent evidence for that purpose." There is nothing in *Stern v. Lowenthal*, 77 Cal. 342, in any way weakening the effect of these decisions. It follows that appellant's contention upon this branch of the case is unsound.

It is claimed that the court committed error in allowing witnesses who had read the publication charged as libelous to testify as to their understanding of its meaning. Those witnesses testified their understanding of the article, after reading it, was to

the effect that it charged the plaintiff as a *particeps criminis* in the murder of Stillwell. This character of evidence was not admissible in the case at bar. Tested by the record, the witnesses for plaintiff to this proposition stood exactly as the jurors. They were in no sense learned and scientific men. They knew nothing of the parties or the circumstances, save what they gathered from the publication. Their conclusions were based alone upon a reading of the article, and under such conditions the jurors were as competent to arrive at a correct conclusion as to the meaning of the publication as were these witnesses. In such a case, the law does not allow the judgment of a witness to be substituted for the judgment of the juror.

The alleged libelous article purported to give a brief statement of the circumstances surrounding the murder of Stillwell. After setting out a large portion of the publication in his pleading, plaintiff thereafter alleged that defendants meant by said publications to charge plaintiff as *particeps criminis* in the murder of Stillwell, and persons reading the article so understood the charge. Plaintiff's attorneys in their brief declare that their client's case in this regard proceeds upon the theory that he has been accused by this publication of committing murder, and allege that the accusation is untrue. No ambiguities appear upon the face of the article. Words of common and ordinary import alone are used. No technical or provincial terms are contained therein. The names of all the parties in any way connected with the affair are plainly given. Under such circumstances, the article is libelous *per se*, or it is not libelous at all. If, by fair inferences and deductions from the article, taken as a whole, it can be said that murder is charged against plaintiff, then the article is libelous *per se*. And the deductions and conclusions of any number of witnesses looking toward or against plaintiff's contention in this regard could not aid the jury in arriving at the true deduction from the publication. Of necessity, these witnesses simply stood upon equal footing with the jurors, and their deductions from the publication were no more likely to be correct than the jurors' deductions.

It is unnecessary to enter into a review in detail of the authorities bearing upon this question. It may be conceded that they are not all in line. At the same time the true rule may be said

to be well established. *Smart v. Blanchard*, 42 N. H. 137, is recognized as sound authority upon this question. The matter is there fully discussed, and, after a review of the leading authorities from various states promulgated by the courts up to that time, that court declared the rule as follows: "Upon a careful examination of the cases, we are inclined to hold that the true rules to be deduced from them are these: that where the words are ambiguous and the application doubtful, it must be shown by plaintiff: 1. That the words were actually used in their actionable sense, and were applied to the plaintiff; 2. That the hearers so understood them. . . . Had it appeared, then, as in the case before us that the meaning was ambiguous and the application doubtful, and that the witness was one to whom the libel complained of was published, his understanding of it would be admissible, especially if it appeared that he was acquainted with the circumstances to which it related. (*Great care, however, should be taken that under the pretense of showing how the hearers understood an ambiguous expression, the mere opinion of the witness as to the interpretation of the language should not be received.*" (Italics ours.) Notwithstanding the courts have not all trod the same path upon this question, yet of the many cases cited by the respondent we fail to find one that reaches the mark of sustaining the legal admissibility of the evidence here introduced. Indeed, when the article is libelous upon its face, and the party libeled is named upon the face of the article, there is no room for the introduction of evidence of witnesses as to their understanding of its meaning. The California cases cited fully bear out our position. In *Maynard v. Fireman's etc. Ins. Co.*, 34 Cal. 58, 91 Am. Dec. 672, it is said: "It is not pretended that the words complained of as a libel are so *per se* for in themselves they cannot be said to import anything of a defamatory character concerning the plaintiff." In *Russell v. Kelly*, 44 Cal. 641, 13 Am. Rep. 169, the name of the plaintiff was not mentioned in the article. This language was used: "At the trial, witnesses were called by the plaintiff to testify that they were acquainted with the parties and familiar with the relations existing between them immediately prior to and at the time the publications were made, and that on reading the publications they understood the plaintiff to be one of the persons referred to." In *Edwards v. San*

Jose etc. Publishing Soc., 99 Cal. 434, 37 Am. St. Rep. 70, the publication was libelous *per se*. In *Harris v. Zanone*, *supra*, the words were libelous *per se*, and this court quoted approvingly the following from Townshend on Libel and Slander, section 97; "Where the language published is the vernacular of the place of publication, it requires no proof that those who heard or read it understood it. . . . Where the matter published is in a language which he who hears or reads it understands, it will be assumed he understood it in the sense which properly belongs to it." In *People v. Collins*, 102 Cal. 345, it is said: "Where the publication is not a libel on its face, but it is claimed that the language used has a covert meaning, it is necessary not only to allege and prove the slanderous or libelous sense in which the words were used by the defendant, but also that they were understood in the same sense by those to whom they were addressed." We conclude that the common import of the words of this article must be applied to test its libelous character. The publisher's intentions are to be gauged by such import. The reader's understanding of it must be based upon such import; and, that being the fact, it is the sole province of the jury to declare its true import from the words used. By such rule the law fully guards the liberty of the press, and also at the same time defends the reputation of the citizen against defamation.

The defendant Blunt, a correspondent of the paper, may be said to be the agent of his codefendant, the publisher, De Young. Malice in fact was a material element in the case, as tending to support exemplary damages. The judgment is a joint judgment against both defendants. Plaintiff and other witnesses testified to statements of Blunt made after the publication of the alleged libelous article for the purpose of proving malice. The admission of this character of evidence was objected to, but the court admitted it as tending to prove the express malice of Blunt alone at the date of the original publication. Appellants insist that such evidence was not admissible, and that it greatly tended to the prejudice and damage of the defendant De Young; but, in view of the law given by the court to the jury bearing upon this question, we cannot agree with appellants' contention. The law given by the court was as follows: "Evidence has been admitted at the trial of declarations made by the defendant Blunt subse-

quent to the publication of the article complained of, and of a subsequent publication by the defendant De Young in the *Chronicle*. This evidence was admitted as tending to show express or actual malice on the part of the defendants at the time of the publication complained of in this action. But I charge you that declarations made by the defendant Blunt after the publication are not competent evidence as against the defendant De Young; nor are subsequent publications, declarations, or acts of De Young, occurring after the publication, evidence as against Blunt, unless he is shown to have participated in them. And, if the plaintiff has failed by competent evidence against him to prove that either of the defendants was actuated by actual malice at the time of the publication, you cannot give the plaintiff exemplary or punitive damages, because your verdict must be a joint one as to the amount, as against both defendants, if you find against both; and proof of actual malice as against one alone will not authorize a verdict for exemplary damages against either." In a subsequent portion of the court's charge this language is used: "You can only give as exemplary damages such sum as you shall believe to be the amount that should be assessed against that defendant against whom the lowest amount of exemplary damages should be given. If you believe that exemplary damages are justified as against one defendant only, then you must not add anything at all for exemplary damages."

It is insisted that the court committed error in refusing to allow defendant Blunt to testify as to the sources of the information upon which the publication was based, and as to the precautions taken by him in verifying that information. This contention is entirely sound. The defendant should be allowed the fullest latitude in showing his good faith in making the publication. It is said in *Wilson v. Fitch*, *supra*: "The publisher, in order to rebut the presumption of malice, should be allowed the fullest opportunity to show the circumstances under which the publication was made, the sources of his information, and the motives which induced the publication." The principle here declared was later approved in *Edwards v. San Jose Publishing etc. Soc.*, 99 Cal. 438; 37 Am. St. Rep. 70.

The charge of the court to the effect that if a crime against plaintiff is charged by the publication, then the defendant, in or-

der to show the truth of the charge, must prove beyond a reasonable doubt that the plaintiff committed the crime is unsound as a legal principle. A preponderance of evidence is sufficient to establish a justification. (*Edward v. Knapp*, 97 Mo. 432.) It is probable this error is merely abstract, and not sufficient of itself to justify a retrial of the case.

There are many other assignments of error relied upon by appellants, but, inasmuch as a new trial must be had, many of these questions will probably not arise for the second time. Others are inferentially disposed of by the foregoing views of the court.

The judgment and order are reversed and the cause remanded for a new trial.

Harrison, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

The following opinion was rendered by Garoutte, J., on the petition for a hearing in Bank.

GAROUTTE, J.—The rule of law declared by Department One of this court in the present case as to the degree of evidence necessary to justify the truth of the charge in certain cases of libel and as declared in the case cited from 97th Missouri, was promulgated without knowledge upon the part of the Department of the decision of this court in *Merk v. Gelzhaeuser*, 50 Cal. 631. If that decision had been before the Department I am satisfied the doctrine there enunciated would have been directly disapproved.

[L. A. No. 401. Department One.—January 27, 1898.]

WILLIAM HAYES, Respondent, v. PIERRE LEON DU-CASSE et al., Appellants.

TAX DEED—RECITALS, HOW FAR REQUIRED—MODE OF OFFERING LAND FOR SALE—SALE OF SMALLEST QUANTITY FOR TAX—PRIMA FACIE EVIDENCE.—The matters now necessary to be recited in a tax deed are those prescribed by sections 3776, 3785, and 3786 of the Political Code, and none other; and it is nowhere required under the present law that the mode of offering the land for sale shall be stated in the deed, as was formerly required, so as to show affirmatively that the

officer sold the smallest quantity which any purchaser would take and pay the taxes; and where the deed contains the recitals made imperative by the Political Code, and shows that the purchaser paid the full amount of the unpaid delinquent tax, together with the costs and charges for the property sold, and recites "that said sale was conducted in the manner prescribed by law," there being nothing in the deed to show that the land sold was not the least quantity which any person would take and pay the taxes, such fact is presumed, and the deed is, by virtue of the express declaration of section 3786 of the Political Code, *prima facie* evidence that "the property was sold as prescribed by law."

ID.—PUBLICATION OF NOTICE OF SALE—PRESUMPTION—RECITAL NOT REQUIRED.—A recital of the publication of the notice of sale is not among those expressly required by law to appear in the deed, and when the deed contains nothing to show that the notice was not published, the due publication thereof, is included in the presumption from the presence of the essential recitals in the deed that at the proper time and place the property was sold as required by law.

APPEAL from a judgment of the Superior Court of the County of Los Angeles. Waldo M. York, Judge.

The facts are stated in the opinion.

Walter F. Haas, and Charles D. Houghton, for Appellants.

R. A. Redman, for Respondent.

BRITT, C.—This case concerns the title to a lot of land in the city of Los Angeles. Plaintiff claims through one Campbell who was the purchaser of such land at a sale thereof made on July 14, 1894, for delinquent state and county taxes of the fiscal year 1893-94. At the trial the defendants offered no evidence, but relied on various objections to the sufficiency of the deed to Campbell executed by the tax collector on May 14, 1896, pursuant to said sale. Plaintiff had judgment, and the only question on appeal is whether the tax deed is void on its face.

It is stated in said deed among other things, that the described parcel of land was "offered for sale at public auction . . . and at such sale N. P. Campbell was declared the purchaser of the whole of the hereinbefore described property, who paid the full amount of said unpaid delinquent tax together with the costs and charges. . . . That said sale was conducted in the manner prescribed by law." Defendants contend that the land is thus shown to have been offered for sale as a whole and not

otherwise, contrary to the provision of the statute that the person who will take the least quantity of land and pay the taxes and costs is the purchaser. (Pol. Code, sec. 3773.) The deed does not recite a procedure at the sale necessarily inconsistent with the requirement of the statute. The land was, of course, rightly offered at public auction (Pol. Code, sec. 3765; it may have been that on a call for bids of the amount of taxes and costs for the least quantity of land there was no response, and that the whole of the land was then offered and found to be the least quantity which any person would take and pay the taxes, etc., if so, the law was satisfied. (*Hewes v. McLellan*, 80 Cal. 393; *Rollins v. Woodman*, 117 Cal. 516.) The deed does not show that such course was not followed and the next question is whether it ought to show affirmatively that it was followed. The matters necessary under the present law to be recited in a tax deed are those prescribed by the statute (Pol. Code, secs. 3776, 3785, 3786) and none other; for as to all proceedings not presumptively established by these recitals (with some exceptions of no present pertinence) the deed is made conclusive evidence of regularity. (Pol. Code, sec. 3787; *Rollins v. Wright*, 93 Cal. 395; *Miller v. Miller*, 96 Cal. 376; 31 Am. St. Rep. 229). Nowhere is it commanded that the mode of offering the land shall be stated in the deed. The deed before us contains the recitals made imperative by said sections of the code; the statement of the manner in which Campbell became the purchaser implies no contradiction thereof; it is, therefore, in virtue of the express declaration contained in said section 3786, *prima facie* evidence that "the property was sold as prescribed by law." This view is sustained by the decisions made on the effect of certain provisions of the revenue act of 1857 (Stats. 1857, p. 325) which much resemble those of the Political Code governing the present case. (*O'Grady v. Barnhisel*, 23 Cal. 287; *Brunn v. Murphy*, 29 Cal. 326; *Wetherbee v. Dunn*, 32 Cal. 106.) The policy of dispensing with detail of evidentiary matter in such deeds is vindicated by the opinion in *O'Grady v. Barnhisel*, as also in *Rollins v. Wright*, *supra*. Defendants cite certain cases in which a tax deed was held to be invalidated by recitals of procedure not conforming expressly to the statutory mode of sale (*French v. Edwards*, 13 Wall. 506; *McGrath v. Wallace*, 116 Cal. 548); to which might be added several others in this court.

The resemblance of those cases to the one at bar is but superficial; it is sufficient to specify a single radical difference: The cases referred to involved sales under a statutory provision that the deed should be conclusive evidence of title, with certain reservations, and with a *proviso* that the officer selling "shall only sell the smallest quantity which any purchaser will take and pay" the taxes. (Stats. 1861, pp. 120, 435; Stats. 1862, p. 523; Stats. 1865-66, p. 607.) The proviso operated as a limitation upon the presumptions which followed upon the deed itself; and as the law then stood it was necessary that the recital should show affirmatively that the sale was made in accordance with the proviso. (*Ferris v. Coover*, 10 Cal. 589, 632.) But the statute now in force contains no restriction on the presumption afforded by a deed, in due form, that the land was "sold as prescribed by law." (Pol. Code, sec. 3786.) To apply the rule of those cases here would be to ignore the advance of legislation for improving the evidential effect of the tax deed.

Defendants urge further that the deed fails to show that publication was made of the notice of sale required by section 3765 of the Political Code, and that the omission was fatal. We are disposed to think that the fact of such publication is fairly to be inferred from the language of the deed; but, not to put the decision of the point on that ground, we prefer to say that a recital of publication of notice is not among those expressly required by law to appear in the deed. Since, therefore, the deed contains nothing to show that notice was not published, the due publication thereof is included in the presumption (which flows from the presence of the essential recitals in the deed) that at a proper time and place the property was sold as prescribed by law. (Pol. Code, secs. 3786, 3787.) Whether such presumption is disputable or conclusive is not now material. The judgment should be affirmed.

Belcher, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Harrison, J., Garoutte, J., Van Fleet, J.

[Sac. No. 272. Department One.—January 27, 1898.]

A. C. IRWIN, Appellant, v. COUNTY OF YUBA, Respondent.

COUNTIES—COMPENSATION OF SUPERVISORS—CONSTRUCTION OF STATUTE—ILLEGAL CLAIM FOR SERVICES—ATTENDANCE UPON ANTI-DEBRIS ASSOCIATION.—The compensation of supervisors under the County Government Act, including the compensation "for *per diem* and mileage or other services rendered by them," was not intended to include any claim for services not coming within the duties of the board as prescribed by law; and no compensation can be allowed to a supervisor for services rendered and moneys expended by him as a representative of the board in attendance upon meetings of an anti-debris association formed by several counties to protect lands along the Feather, Yuba, and Bear rivers, against danger and damage from the results of hydraulic mining.

ID.—CLAIM AGAINST COUNTY MUST BE AUTHORIZED BY LAW—BENEFIT IMMATERIAL.—One who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which finds authority of law; and it is not sufficient that the services performed for which payment is claimed were beneficial.

ID.—COMPENSATION OF PUBLIC OFFICERS—EXTRA CHARGE NOT PERMISSIBLE.—A person who accepts an office with compensation fixed by law is bound to discharge the duties of the office for such compensation without extra charge.

APPEAL from a judgment of the Superior Court of Yuba County. Edwin A. Davis, Judge.

The facts are stated in the opinion.

W. H. Carlin, for Appellant.

E. P. McDaniel, District Attorney, for Respondent

CHIPMAN, C.—The complaint sets forth that certain counties of the state, to wit, Yuba, Sutter, Sacramento, Colusa, Glenn Tehama, Yolo and Solano, "banded together for self-protection against" certain alleged "danger and damage" arising from the deposit through hydraulic mining operations of "masses of debris, gravel, sand, and other heavy material into the Feather, Yuba, and Bear rivers, filling up the channels of said rivers, thereby causing the same to overflow their banks," thus causing "many thousands of acres of valuable land therein to be entirely destroyed and rendered valueless"; and that said counties formed

an organization prior to the year 1892, which has ever since existed, and still exists, under the name of the "State Anti-Debris Association" for protection against such damage; that said association has, by its efforts, and by legal measures taken to that end saved to each of said counties large amounts of property from ruin; that during the years 1894, 1895 and 1896 defendant county "contributed as its *pro rata* of the necessary cost and expense for such protection to the said association the sum of two hundred dollars per month for each and every and all of the said months in said years down to the commencement of this action"; that said association during said time held monthly meetings at the city of Sacramento, and that said association consisted "of a combination of committees sent thereto for that purpose from and by the several boards of supervisors of the said several counties"; that the board of supervisors of said Yuba county during all of said time organized itself into several committees for carrying on its business, and, among others, formed an anti-debris committee of said board, of which plaintiff was a member and chairman, and as such met with said association at Sacramento. The complaint then sets out that plaintiff expended, as necessary personal expense in attendance upon said association, the sum of two hundred and fifty dollars, and that he is entitled to the further sum of "fifty dollars as his *per diem* for said attendance." It is alleged that his claim for said amounts was duly filed with the board of supervisors of defendant, and was duly received and audited and found correct by said board, but was rejected "for the sole reason that the district attorney of said county declared the said claim illegal." The complaint prays judgment against defendant for the amount. A general demurrer to the complaint was sustained, and, plaintiff declining to amend, defendant had judgment, from which plaintiff appeals.

Appellant contends that the expenditure of the moneys for the purposes stated constitutes a county charge, and that plaintiff was the proper person to perform the service and expend the money.

It cannot be pretended that this so-called "Anti-Debris Association" is anything more than a voluntary association of citizens, like many others convened to consider matters deemed by them of common interest; it has no existence beyond the mutual

consent of its members and from it any of its members may withdraw at any time. The fact that it is made up of a combination of committees appointed by the several county boards of supervisors from their own number can give it no legal existence. Those boards cannot create new offices and prescribe their duties and appoint themselves to fill the offices and perform the duties. Boards of supervisors frequently make appointments of persons (sometimes including one or more of their number) to attend conventions called to consider matters relating to the internal concerns of counties; and, while no authority of law is given them to do this, it has been found a convenient and satisfactory method of obtaining representation at important conferences of the people, and it is universally acquiesced in. But the power is not to be found in any statute and its assumption would quickly lose the common consent if it should be held that the boards could also provide for compensating the services rendered under such appointments. Plaintiff stands in no better or different position from that of any other appointee of the board selected to act as a member of this debris association, unless it can be shown that the duties thus placed upon him fell within his official duties prescribed by law, and it can also be shown that he may be compensated beyond the compensation allowed for the performance of his ordinary duties as a member of the board. No provisions of any statute have been pointed out, and we know of none, making it any part of the duty of a member of the board of supervisors to act as a member of any such association, nor can it be said that to do so is either within any implied powers of a member of such board or necessarily incidental to any granted powers. But, if they were, the law fixes and limits the compensation to be paid. In the County Government Act, section 216 (Stats. 1893, p. 507), it is provided that "the salaries and fees provided by this act shall be in full compensation for all services of every kind and description rendered by the officers therein named (among them the members of the board of supervisors), either as officers or *ex officio* officers, their deputies and assistants, unless in this act otherwise provided," etc.

Appellant relies upon section 51 of this same act, page 365, where it is said that, "All claims against the county presented by members of the board of supervisors for *per diem* and mileage,

or other services rendered by them, must be itemized," etc; and it is claimed that the legislature has thus recognized the payment of claims other than *per diem* and mileage, and that the clause in italics was intended to embrace "extraordinary cases which otherwise would not be provided for."

We do not think that the provision quoted was intended to include any claim for services not coming within the duties of the board as prescribed by law. The board was certainly not left to decide for itself the limit it could put upon expenditures, for the law was careful to provide that the salaries and fees provided in the act "shall be in full compensation for all services . . . unless in this act otherwise provided." We are not called upon at this time to say what meaning might, in some possible case which might arise, be given to the words, "or other services rendered by them"; but we are clearly of the opinion that they do not include such services as are set forth in the complaint either as *per diem* or mileage or otherwise. It is common history that like associations have been formed in the mining counties, we may presume with equally sincere motives, to resist the efforts made by this very Anti-Debris Association and under claims that the deposit of debris in the streams named is and was by right and that great harm would come by preventing such deposit. If plaintiff's contention be correct, we should have the public funds of one county used to prevent the consummation of an object which the funds of another county were being used to promote, and both claiming under the same general law. Such a result cannot be permitted, in the absence of positive and clear statutory authority. The act in question, section 230, page 511, specifies what are county charges; they cannot be extended to embrace any such claim as this. The duties of the board relate generally to such as are discharged while in session within their own county, and to duties imposed upon them when acting as road commissioners. It certainly cannot be claimed that the services of plaintiff at Sacramento, while in attendance upon the debris association, was as a member of the board while in session as such board, nor as a road commissioner, nor was the claim sued upon for *per diem* or mileage in either capacity. We are unable to see why this claim if allowed would not work an increase in plaintiff's compensation which cannot be done if we are to regard

the services performed to be part of his official duty; and, if they were not, they were outside all authority of law. (*Dougherty v. Austin*, 94 Cal. 602; and see, also, *Welsh v. Bramlet*, 98 Cal. 222.) It will hardly be contended that the board could delegate any of its powers to this debris association.

Boards of supervisors are frequently asked to give the aid of public funds in their control to objects unknown to the law but upon grounds of local policy and for what may seem to be at the time for the welfare of the locality, and such expenditures are often acquiesced in by the people. But whenever the courts have been appealed to in these cases, they have uniformly held to the only safe rule—that public officers and municipal boards must keep within the limits of their power as prescribed by law. Many illustrations may be drawn from decided cases; one or two will suffice. In *Andrews v. Pratt*, 44 Cal. 309, the board were authorized to sell certain railroad bonds, and in doing so incurred some traveling expenses, but this court held that the claim could not be paid. In *Domingos v. Supervisors*, 51 Cal. 608, the board appointed one of its members to superintend the construction of a drainage canal. His claim for services was denied.

It may be safely stated as a rule that one who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which itself finds authority of law. It is not sufficient that the services performed, for which payment is claimed, were beneficial. Nothing is better settled than that a person who accepts an office with compensation fixed by law is bound to perform the duties for the compensation. Mr. Dillon in his *Municipal Corporations*, section 233, speaking of this rule, says: "The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may properly be attached to an office to lay the foundation for extra compensation, would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may, and what may not, be considered strictly official; and if these distinctions are much favored by the courts

of justice it may lead to great abuse." Again, the same author says (section 234): "Not only has an officer, under such circumstances no legal claim for extra compensation, but a promise to pay him an extra fee or sum, beyond that fixed by law, is not binding, though he renders services and exercises a degree of diligence greater than could legally have been expected of him." Our own supreme court is not alone in the position here taken. The doctrine is fully sustained in *Ewing v. Ainger*, 96 Mich. 587. It was held in *Hartson v. Dale*, 9 Wash. 379, that attendance by a member of the board of county commissioners, before the state board of equalization to resist the raising of the county assessment-roll, was no part of his duty as such commissioner and could not be made the subject of a claim against the county. The same doctrine was enunciated in *Board of Supervisors v. Ellis*, 59 N. Y. 620. So, also, in *Moore v. Toledo City Independent Dist.*, 55 Ia. 654, and numerous other cases which might be cited. We think the judgment should be affirmed, and so advise.

Searls, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Harrison, J., Garoutte, J., Van Fleet, J.

Hearing in Bank denied.

[S. F. 971. Department Two.—January 28, 1898.]

MATILDA PILGER et al., Appellants, v. MAX STRASSMAN
et al., Respondents.

APPEAL—DISMISSAL—FAILURE TO FILE POINTS AND AUTHORITIES.—The failure of an appellant to file his points and authorities, without reasonable excuse, within the time allowed therefor by the rule of the supreme court, and within a long period of time allowed thereafter by extensions of time for that purpose, is ground for dismissal of the appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Henry E. Highton, for Appellants.

Dunne & McPike, and Walter H. Levy, for Respondents.

THE COURT.—This cause is before the court upon the motion of respondents to dismiss the appeals from the judgment and order denying appellants' motion for a new trial, upon the ground that appellants have failed to file any points and authorities within the time prescribed by the rules of this court. It appears from the moving papers that the transcript of appeal was filed, after a long extension had been given for filing the same, on May 22, 1897; that after the filing of the transcript appellants were given by respondents an extension of fifty-two days beyond the thirty days allowed by the rules within which to file their points and authorities; that further time was asked by appellants and refused by respondents, and that thereafter appellants obtained from this court a further extension of twenty days, and that no points were filed within said time. We have carefully examined the affidavits presented on behalf of appellants in opposition to the motion, and we find in them no reasonable excuse for not preparing and filing the points and authorities within the long period of time granted them by said extensions.

The motion is granted, and said appeals are dismissed.

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ACCOUNTING. See Estates of Deceased Persons, 3-5, 10, 30-33; Guardian and Ward; Place of Trial; Receivers.

ACKNOWLEDGMENT. See Mortgage, 26.

ADVERSE POSSESSIONS.

PAYMENT OF TAXES BY LEGAL OWNER—REPAYMENT BY OCCUPANT.—

Where the taxes upon a lot were assessed to and paid by the legal owner of the lot, the lien thereof was gone, and any subsequent repayment of such taxes in any year by an occupant of the lot could not serve to ground or maintain an adverse possession by such occupant under section 325 of the Code of Civil Procedure. (Carpenter v. Lewis, 18.)

See Boundaries, 6; Mortgage, 38; Statute of Limitations.

AGENCY.

1. **POWER OF ATTORNEY—SALE AND TRANSFER OF NOTES AND MORTGAGES—NO POWER OF HYPOTHECATION CONFERRED.**—A power of attorney authorizing the attorney in fact to sell, transfer, and release certain mortgages therein specified, and to indorse and transfer the notes thereby secured, and to sell and transfer the claims of the principal for said notes and mortgages against the estate of the deceased mortgagor, and to receive payment of said claims and give acquittances therefor, confers only a power to sell and transfer the title to the securities absolutely, or, if not so sold, to collect them from the estate of the deceased mortgagor, and no power is conferred thereby to hypothecate the mortgages as security for borrowed money, and such hypothecation, being in excess of authority is void, and vests no right in the person to whom the hypothecation is made. (Hawxhurst v. Rathgeb, Sr., 531.)

2. **ACTION BY HOLDER OF SECURITIES—DETERMINATION OF ADVERSE CLAIM—FINDINGS AGAINST EXECUTION OF POWER—SPECIAL ORDER REFUSING NEW TRIAL—CONSTRUCTION OF POWER—EFFECT UPON FINDINGS.**—In an action brought by the holder of a hypothecated note and mortgage which had been transferred to plaintiff as security for money borrowed by one claiming to act as attorney in fact for the mortgagee, to determine an adverse claim made thereto by the mortgagee, where the court found that the power of attorney had not been executed by the mortgagee, and that there was no authority for the hypothecation, and rendered judgment for the defendant, and plaintiff moved for a new trial on the alleged ground of insufficiency of the evidence to sustain the findings, and the court
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AGENCY (Continued).

denied the motion solely upon the ground that the power of attorney, assuming it to be genuine, conferred no power to assign the note and mortgage as security for the individual debt of the attorney in fact, and stated that "otherwise, a new trial would have been granted," *held*, that the recitals in the order did not operate to change the findings as theretofore existing, and that they remained as originally made, and could only be set aside by the granting of a new trial. (Id.)

See Contract, 1; Fraud, 2, 3; Sale, 2.

ALIMONY. See Divorce, 8.

AMENDMENT. See Practice, 3, 4.

ANNUITY. See Estates of Deceased Persons, 3; Will, 4-6.

APPEAL.

1. **INFORMAL CERTIFICATE TO TRANSCRIPT — MOTION TO DISMISS—LEAVE TO ADD CERTIFICATE.**—An appeal will not be dismissed on account of an informal certificate to the transcript, where the appellant produces a proper certificate, and he will be allowed to add such certificate to record. (*Hellings v. Duval*, 199.)
2. **OMISSION OF PARTS OF JUDGMENT-ROLL—DISMISSAL—EXCEPTIONS TO TRANSCRIPT.**—The objection that some portions of the judgment-roll have been omitted from the transcript is not ground for the dismissal of an appeal, in the first instance; but the remedy of the respondent is to notify appellant of his exceptions to the transcript, at least five days before the hearing of the appeal, under rule XV of this court. The appellant will then have an opportunity to supply the papers, and, failing to do so, must take the risk of having his appeal dismissed. (Id.)
3. **FAILURE TO FILE TRANSCRIPT—DISMISSAL REFUSED—UNSETTLED BILL OF EXCEPTIONS.**—An appeal will not be dismissed for failure to file a transcript within forty days after the taking of the appeal, where it appears that the settlement of a bill of exceptions to be used upon the appeal is pending and undetermined, and there is no counter showing that the right of the appellant to have the bill of exceptions settled has not been kept alive. (*Pignaz v. Burnett*, 157.)
4. **APPEALABLE ORDER—REFUSAL TO RESTRAIN SHERIFF FROM EXECUTING WRIT OF ASSISTANCE, GRANTED EX PARTE.**—An order refusing a motion of persons in possession of lands sold under foreclosure of a mortgage, who were not notified of an *ex parte* order granting a writ of assistance to a purchaser at the sale, to restrain the sheriff from executing the writ, is appealable as an order made after final judgment; and the fact that the motion was in effect a motion to vacate the order granting the writ and to recall the writ, will not justify the dismissal of the appeal from the order refusing the motion. (Id.)
5. **REFUSAL TO VACATE ORDER, WHEN APPEALABLE.**—It is only when a party aggrieved has already had an opportunity to appeal from an

APPEAL (Continued).

original order that he cannot appeal from an order refusing to vacate it; but the reason of this rule does not apply where no appeal could be taken from the first order, or when such an appeal would be vain for lack of a record showing the rights of the aggrieved party; and where the first order was made *ex parte*, the right to move to vacate the order, and to show cause against it is implied, and the only appeal which can avail is an appeal from the order refusing to vacate the first order. (Id.)

6. **FAILURE TO GIVE UNDERTAKING—GROUNDS OF MOTION TO DISMISS.** The failure to give an undertaking upon an appeal from an order will not be considered upon a motion to dismiss the appeal, which does not assign such failure as one of the grounds of the motion. (Id.)
7. **APPEAL FROM JUDGMENT—TIME FOR APPEAL—AMENDMENT OF CODE NOT RETROSPECTIVE—DISMISSAL REFUSED.**—The amendment to section 939 of the Code of Civil Procedure, approved March 3, 1897, reducing the time allowed for appeal from a judgment from one year to six months is to be construed not to be intended to operate retrospectively upon judgments entered before its passage, but as limited in its operation to judgments thereafter entered; and an appeal taken within one year from the entry of a judgment entered before the passage of such amendment and more than six months after such entry, will not be dismissed. (Id.)
8. **MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS—ERRORS OF LAW—SPECIFICATIONS.**—Where a motion for a new trial is based upon a bill of exceptions no specifications of errors of law are required, in order to secure their consideration by the trial court or by the appellate court. (Smith v. Smith, 183.)
9. **REVIEW UPON APPEAL—ERRORS WITHOUT PREJUDICE.**—A judgment will not be reversed for mere technical errors of law, which are of too little consequence to be substantially prejudicial. (Id.)
10. **REVIEW OF ORDER DENYING NEW TRIAL—AFFIDAVITS NOT IDENTIFIED.**—Affidavits of newly discovered evidence printed in the transcript upon appeal, but not identified as having been the affidavits used upon the motion for a new trial, nor shown to have been filed in the court below, cannot be considered by this court upon appeal from the order denying a new trial. (Whipple v. Hopkins, 349.)
11. **BILL OF EXCEPTIONS—PROPER REFUSAL OF SETTLEMENT—FAILURE TO COMPLY WITH STATUTE.**—Where the party proposing a bill of exceptions refuses to adopt the amendments, and fails to present the same for settlement within the time limited by section 650 of the Code of Civil Procedure, without offering any excuse therefor, the court is justified in refusing to settle the bill when subsequently presented for settlement. (Id.)
12. **ORDER REFUSING TO SETTLE BILL OF EXCEPTIONS NOT REVIEWABLE UPON APPEAL—MANDAMUS.**—If a judge improperly refuses to settle a bill of exceptions, he may be compelled to act by writ of mandate, but his refusal to act is not an appealable order, and cannot be reviewed upon appeal from an order of the court denying

APPEAL (Continued).

a new trial, which must be determined upon the same record as that presented in the court below. (Id.)

13. **DISMISSAL—FAILURE TO FILE POINTS AND AUTHORITIES.**—The failure of an appellant to file his points and authorities, without reasonable excuse, within the time allowed therefor by the rule of the supreme court, and within a long period of time allowed thereafter by extensions of time for that purpose, is ground for dismissal of the appeal. (*Pilger v. Strassman*, 691.)
14. **CRIMINAL LAW—ABSENCE OF NOTICE FROM TRANSCRIPT—CERTIFICATE OF CLERK—DISMISSAL.**—Where the transcript on appeal in a criminal case, contains no copy of the notice of appeal, and does not show that any notice of appeal was served, the clerk merely certifying that the transcript sets forth true copies of the information, etc., "and also of the notice of appeal duly filed herein," there being nothing in the record to show from what the appeal was taken, or that the notice was served upon the attorney for the adverse party, the appeal cannot be considered, and must be dismissed. (*People v. Colon*, 668.)
15. **APPEAL FROM DISTINCT ORDERS—SINGLE UNDERTAKING—INDISTINCT REFERENCE—DISMISSAL—REVIEW UPON MOTION.**—A single undertaking given upon an appeal from several separate and distinct orders, which does not distinctly refer to either appeal, is entirely invalid for any purpose, and such appeal will be dismissed; nor will it be inquired into whether any of the orders were or were not appealable, where the motion to dismiss the appeal was made upon the ground that there had not been a compliance with the statutory provision prescribing the mode of taking the appeal, and did not express the ground that any of the orders appealed from were not appealable. (*Estate of Heydenfeldt*, 346.)
16. **FILING OF NEW UNDERTAKING—CONSTRUCTION OF CODE—VOID UNDERTAKING.**—Section 954 of the Code of Civil Procedure only authorizes a new undertaking upon appeal to be filed, when the one filed is insufficient, and does not apply where the undertaking given is void, in which case it is as though no undertaking had been filed, and no appeal perfected within the time required by law, and no new undertaking can be permitted to be filed in the appellate court. (Id.)
17. **ESTATES OF DECEASED PERSONS—DECREE OF DISTRIBUTION NOT ENTERED IN MINUTE BOOK—PREMATURE APPEAL—DISMISSAL.**—A decree of distribution of the estate of a deceased person is not entered, within the meaning of section 1715 of the Code of Civil Procedure, which provides that an appeal in probate proceedings "must be taken within sixty days after the order, decree, or judgment is entered," until it is "entered at length in the minute book of the court" as provided in section 1704 of the same code; and an appeal taken therefrom before such entry is premature, and vests the appellate court with no jurisdiction of the cause, and will be dismissed. (*Estate of Pearsons*, 27.)
18. **ENTRY IN CLERK'S REGISTER—MISLEADING OF APPELLANT—FAILURE TO MAKE INQUIRY.**—An entry in the clerk's register of actions not-

APPEAL (Continued).

ing an entry of decree in the minutes, which had in truth no reference to its final entry at large in the minute-book, but only to an entry made by the courtroom clerk in his rough daily minutes of proceedings, of the fact that the decree had been made and filed, is not such an entry as could be conclusive in favor of the appellants that the decree had been finally entered, where it appears that they could have ascertained the true meaning of the entry by inquiry in the clerk's office, and although the appellant's were misled by such entry in the register through failure to make inquiry, that fact cannot confer rights upon them which they otherwise have not. (Id.)

19. **ESTOPPEL OF RESPONDENTS—JURISDICTION.**—No estoppel of respondents by their acts from pressing a motion to dismiss a premature appeal can avail the appellants, conceding that the facts show such estoppel, as the court has no jurisdiction to entertain such an appeal, and, upon the fact appearing, it will be dismissed of the court's own motion. (Id.)
20. **DIVORCE—CUSTODY OF CHILDREN—MODIFICATION OF DECREE—STAY OF PROCEEDINGS—CONTEMPT—VOID ORDERS—HABEAS CORPUS.** An appeal from an order modifying a decree of divorce, so as to award to the father the custody of the minor children, which by the original decree were awarded to the custody of their mother, suspends and stays all proceedings, under the modifying order; and orders made pending such appeal, directing the mother to deliver the custody of the children to the father, and punishing her for contempt for refusal to obey such direction, are without jurisdiction and void, and she will be discharged from unlawful imprisonment therefor, upon *habeas corpus*. (Ex parte Queirolo, 635.)
21. **STATUTORY CONSTRUCTION—EFFECT OF APPEAL FROM JUDGMENT.**—The effect of an appeal from a judgment is purely a matter of statutory regulation, to be determined by a construction of the statute under which the appeal is taken, and, when its terms are clear and unambiguous, the court is concluded thereby, and its function is simply to enforce the statute, without regard to supposed evil consequences resulting therefrom. (Id.)
22. **REVIEW UPON APPEAL—AMENDABLE OBJECTION TO COMPLAINT—REVERSAL—NEW TRIAL.**—Where the judgment is reversed and the cause remanded for a new trial, it is unnecessary to review and pass upon an objection to the complaint which may be obviated by amendment. (Lissak v. Crocker Estate Co., 442.)

See Criminal Law, 3, 4, 7-12, 37, 43, 56; Estates of Deceased Persons, 7, 19, 36; Justice's Court; Mortgage, 12, 23; Municipal Corporations, 18.

ASSIGNMENT. See Claim and Delivery, 2; Mortgage, 7, 13, 14.

ATTACHMENT.

1. **BOND FOR RELEASE—TWO DEMANDS REQUIRED TO CHARGE SURETIES—JOINT AND SEVERAL LIABILITY.**—Under a bond given for

ATTACHMENT (Continued).

the release of attached property, conditioned that if plaintiff recover judgment, defendant will, on demand, redeliver the attached property to the proper officer, to be applied on the payment of such judgment, or, in default thereof, the defendant and sureties will, on demand, pay to plaintiff the full value of the property released, not exceeding the amount of the bond, the liability of the sureties does not arise until a demand and refusal of the defendant to redeliver the attached property, and, when such demand and refusal has been made, a further demand upon the obligors of the bond for the payment of the value of the property is essential to a right of action upon the bond; but where the liability of the principal and sureties is by the terms of the bond joint and several, and only the sureties are sued without joining the principal, it is sufficient to make demand for the payment of the value of the property upon the sureties alone. (*Mullally v. Townsend*, 47.)

2. **DEMAND FOR REDELIVERY—CHATTEL MORTGAGE—REFUSAL.**—Where, subsequently to the release of the property attached, it has been subjected by the defendant to a chattel mortgage executed to a third party, the plaintiff, upon the issuance of execution with instructions to levy upon the property attached, is not bound to accept the property burdened with such chattel mortgage, and the refusal of the defendant and the chattel mortgagee to deliver the property to the sheriff, upon his demand therefor, otherwise than upon the payment of such chattel mortgage, is a refusal to redeliver the attached property to the sheriff. (*Id.*)
3. **JUDGMENT LESS THAN VALUE OF PROPERTY—DEMAND UPON SURETIES FOR PAYMENT—MEASURE OF OBLIGATION.**—If the judgment recovered by the plaintiff is less than the value of the property attached as fixed in the bond for release, and less than its admitted value at the time of the release, the payment of the amount of the judgment, is the full measure of the obligation of the sureties upon such bond, and a demand upon them "that they pay to the plaintiff the said judgment" is a specific and sufficient demand to charge the sureties, where there has been a refusal of the defendant to redeliver the property. (*Id.*)
4. **GENERAL DEMAND FOR FULFILMENT OF OBLIGATION.**—A general demand upon the sureties on the bond for release that they fulfill their obligation, as expressed in their undertaking, is sufficient, if standing alone, to charge them with their obligation to satisfy the judgment against the defendant, when it is less than the admitted value of the property at the time of the release, and is not inconsistent with a specific demand that they should pay the said judgment, but requires the same thing in different language. (*Id.*)
5. **OBJECT AND SUFFICIENCY OF DEMAND.**—The legitimate object of a demand is to enable a party to perform his contract, or discharge his liability, according to the nature of it, without a suit at law; and there is no stereotyped form or manner of demand, but any language intended to constitute a demand, and which plainly in-

ATTACHMENT (Continued).

forms the party of whom the demand is made that he is required to perform the duty or obligation to which the demand refers, is sufficient. (Id.)

6. **PLEADING OF DEMAND—CERTAINTY—GENERAL DEMURRER—MOTION FOR NONSUIT.**—Where an obligation itself provides that a demand shall be made, it must be made and alleged, and should be pleaded with directness and certainty; but an objection to the sufficiency of an allegation of demand for want of certainty must be by special demurrer pointing out the particular defects complained of, and cannot be urged upon general demurrer to the complaint, nor upon a general objection raised to its sufficiency to state a cause of action, upon a motion for nonsuit which admitted all of its allegations to be sustained by sufficient evidence. (Id.)
7. **ANSWER—INSUFFICIENT DENIALS OF ATTACHMENT—PROCEEDINGS FOR WANT OF KNOWLEDGE OR INFORMATION.**—Denials in the answer of the sureties, made to allegations in the complaint in reference to the commencement of the action and the attachment of the property, for the release of which their bond was admitted to have been given, made for want of knowledge or information sufficient to form a belief of the allegations denied, the truth of which was readily ascertainable from the public records, and was indicated by the affirmative allegations of the answer to be within the knowledge or information of the defendants, are insufficient to raise an issue, and may be properly stricken out or disregarded by the court. (Id.)

See Execution, 1, 2; Mortgage, 10.

ATTORNEY AND CLIENT. See Estates of Deceased Persons, 19, 20; Mortgage, 16, 24.

ATTORNEY IN FACT. See Agency.

BANKS.

1. **SAVINGS BANK—CHARTER—AMENDMENTS—COMMERCIAL BUSINESS—DEPOSITORS NOT STOCKHOLDERS PREFERRED—BY-LAWS.**—A savings bank organized under the banking act of 1862, which had the required capital stock contemplated by the amendments of 1864, was authorized by those amendments to engage in commercial business; but the original act as thus amended constituted its charter, and, in the absence of the adoption of a by-law, authorized thereby, extending the same security to depositors who were stockholders as to other depositors, the provisions of the act giving depositors who were not stockholders a prior claim upon the assets applies to savings banks who were doing a commercial business; and it was competent for its stockholders, either by acquiescence in the terms of the statute or by an express provision in its by-laws, to assure such preference to nonstockholding creditors. (Murphy v. Pacific Bank, 334.)
2. **LIABILITY OF STOCKHOLDERS—UNCONSTITUTIONAL EXEMPTION—INDEPENDENT PROVISION.**—The unconstitutional exemption of stockholders of savings banks from liability under the act of 1862, was

BANKS (Continued).

an independent provision, and did not affect or annul the provision declaring a preference in favor of nonstockholding creditors in the distribution of the assets. (Id.)

3. **CERTIFICATE OF DEPOSIT TO STOCKHOLDER.**—The fact that a certificate of deposit was issued to a stockholder of a savings bank doing a commercial business, does not determine the character of the business transacted by the bank. Such certificates are usual with commercial banks, and, under section 576 of the Civil Code, may be issued by savings and loan corporations. (Id.)
4. **CONSTITUTIONAL LAW—FORMATION OF CORPORATIONS UNDER GENERAL LAWS—CHANGE OF LEGISLATION AS TO SAVINGS BANKS.**—The fact that the act of 1853 for the incorporation of savings banks did not postpone the claims of depositors who were stockholders, as was provided in the subsequent act of 1862, does not render the latter act unconstitutional, and its general and uniform operation is not affected because it authorizes corporations to adopt or reject the provision for such postponement. (Id.)
5. **PARTIAL REPEAL OF PRIOR INCORPORATION ACT—EFFECT OF CODE.**—The act of 1862 was so far repealed by section 238 of the Civil Code that no new corporations could be formed under that act; but it remained in force so far as corporations theretofore formed were concerned, not only to sustain their existence, but also to fix their character, and define their powers, duties, obligations, and liabilities, except so far as modified by inconsistent code provisions relating to such corporations, unless they should elect to come under the code provisions. (Id.)

See Receivers.

BENEFIT SOCIETY. See Mutual Benefit Society.

BILL OF EXCEPTIONS. See Appeal, 3-8, 10-12; Criminal Law, 65.

JONA FIDE PURCHASER. See Mortgage, 18, 19, 31.

BONDS. See Attachment, 1, 3-6; Insolvency, 7; Municipal Corporations, 3, 13-15; Sureties.

BOUNDARIES.

1. **BOUNDARY OF LOT—DISPUTE AS TO DIVISION LINE—ACTION TO ENJOIN REMOVAL OF BULKHEAD—PRELIMINARY INJUNCTION—IMPROPER DISSOLUTION.**—In an action to enjoin the removal of a bulkhead which for fourteen years had practically marked the division of occupation of adjacent lots of plaintiff and defendants, the defendants claiming the right to remove it, as occupying eight inches of defendants' lot, which claim was disputed by the plaintiff, a preliminary injunction should be allowed to stand until the trial, a dissolution of it being improper, as practically equivalent to a dismissal of the action before a trial upon the merits, where it is not made reasonably certain by the pleadings and affidavits that the attack upon plaintiff's title and right of occupation up to the

BOUNDARIES (Continued).

existing bulkhead line would be ultimately successful. (*Bullard v. Kempff*, 9.)

2. **DISPUTED TITLE—GROUND FOR INJUNCTION PENDENTE LITE—PRESERVATION OF PROPERTY.**—The mere existence of a doubt as to the title does not of itself constitute sufficient ground for refusing an injunction; and the jurisdiction of the court to issue injunctions where the title is in dispute is asserted for the preservation of the property pending proceedings for the determination of the title of the parties. (*Id.*)
3. **IMPROVEMENTS BY FORMER OWNER OF ADJACENT LOTS—SALE OF IMPROVED LOTS—LOCATION OF BOUNDARIES—MONUMENTS CONTROLLING DISTANCES.**—Where a former owner of adjacent lots improved them by the erection of houses, bulkheads, and fences, making each ready for occupancy, and sold them, putting persons in possession of the respective lots just as they were inclosed and improved, the boundary lines designated by the improvements, being the monuments fixed by the original survey and measurement of the adjacent lots by the common vendor, control the distances described in the deeds, and fix the actual location of the lines upon the ground. (*Id.*)
4. **DECLARATION OF VENDOR TO DEFENDANT—NONCOMMUNICATION TO PLAINTIFF.**—A declaration made by the common vendor of the improved lots to one of the defendants at the time of his purchase, that the house which constituted part of the bulkhead was four inches from the east line, and that each of a row of houses erected by the same vendor was built four inches from the east line of the lots, so as to leave room for the overhanging gutterways, such declaration not having been communicated to plaintiff, is inadmissible to change or affect the lines marked by the common vendor upon the ground by the monuments erected thereon. (*Id.*)
5. **ACQUIESCENCE IN OCCUPATION BY MONUMENTS—EFFECT UPON PRELIMINARY INJUNCTION.**—The long acquiescence of the defendants in the occupation of the adjacent lots according to the monuments erected thereon, aside from any question of its being a new source of right, whether operating by estoppel or otherwise, should have great weight upon the question whether the preliminary injunction against the removal of the bulkhead line should be continued until the trial of the action permanently to enjoin its removal. (*Id.*)
6. **ADVERSE POSSESSION—TAXES—MONUMENTS CONTROLLING DESCRIPTION IN ASSESSMENT ROLL.**—Where the fences constitute monuments which control the description in the deeds of adjacent lots, such monuments must also control the description in the assessment-roll, and the question of adverse possession and payment of taxes need not be considered. (*Id.*)

See Streets, Roads and Highways.

BROKER. See Contract, 5-8.

CERTIFICATE OF DEPOSIT. See Banks, 3.

CERTIORARI. See Contempt, 1; Insolvency, 4.

CHURCH.

1. **RELIGIOUS CORPORATIONS—DIVISION OF CHURCH—ACTION FOR DIVISION OF FUNDS—PARTIES—REPRESENTATION OF NUMEROUS MEMBERS.** Where an incorporated Presbyterian church was divided, by authority of the Presbytery, into two organizations, to each of which was given a new name, and the Presbytery directed a division of funds realized from a sale of real estate of the corporation to be made between the two churches in proportion to their membership, and the minority organized another church in pursuance of the decree of the Presbytery, but the majority repudiated its action, and refused to organize a new church as directed, but retained and insisted upon the corporate name, and refused to pay any part of the funds to the new church, an action in equity may be brought on behalf of the new church to compel an equitable division of the trust funds; and the new church being an unincorporated body, consisting of numerous members, alleged to have a common and personal interest in the cause of action, a few of its members may maintain the action on behalf of themselves and all others of its members, and where the parties defendant consisted of the corporation and its trustees, and of a few individuals who were made members of the other church ordered by the Presbytery to be organized by the majority, who are alleged to be sued on behalf of themselves and all other members ordered to make such organization, and who refused to abide by the action of the Presbytery, there is no defect of parties plaintiff or defendant. (*Wheelock v. First Presbyterian Church of Los Angeles*, 477.)
2. **POWER OF ECCLESIASTICAL COURT—AUTHORIZED DIVISION OF CHURCH—CONCLUSIVENESS OF ACTION.**—Conceding that neither the Presbytery nor a commission appointed by it had power to divide and apportion the moneys of the corporation, and that the division thereof is matter for the civil courts, yet the Presbytery, as an ecclesiastical court, had the power to deal with the Presbyterian church as an ecclesiastical body, in all matters ecclesiastical, and had power to dissolve and disband the church, and to divide it into two new and independent organizations, and its decisions and decrees pertaining to the church as an ecclesiastical body are not only binding upon that body, but are also binding and conclusive upon the courts, wherever and whenever material to pending litigation. (*Id.*)
3. **INCORPORATION OF CHURCH—CONSTRUCTION OF CODE—SUBORDINATION OF TEMPORALITIES—AGENCY—TRUST RELATION TO MEMBERS—JURISDICTION OF COURTS.**—The incorporation of a church as a religious body, under the Civil Code of this state, is permitted only as a convenience to assist in the conduct of the temporalities of the church, and, notwithstanding incorporation, the ecclesiastical body is all important; and the incorporation is subordinate in the life and purposes of the church, and its function and object is to stand in the place of an agent holding title to the property and managing it in the interest of the church as an ecclesiastical body, and its position is that of a trustee, holding property for the use and enjoy-

CHURCH (Continued).

ment of the church, and every member of the church is a beneficiary of that trust; and courts will deal with the property of a church and enforce a trust therein in the same way, whether it is incorporated or not. (Id.)

4. **ECCLESIASTICAL DIVISION OF INCORPORATED CHURCH—DIVISION OF FUNDS IN EQUITY—EFFECT UPON CORPORATION IMMATERIAL.**—The fact of incorporation of a church under the Civil Code, in accordance with its rules, regulations, and discipline, does not stand in the way of or preclude an ecclesiastical division of the church into two churches under an ecclesiastical authority having jurisdiction of that matter; and where an incorporated Presbyterian church has been thus divided by the Presbytery, a court of equity will divide a trust fund held by the corporation for the benefit of its members, *pro rata* between the two churches, according to the number of members assigned by the Presbytery to each new church organization decreed by it to be formed; and it is immaterial to inquire whether such division will have the effect indirectly to result in the dissolution or death of the corporation or not. (Id.)

CLAIM AND DELIVERY.

1. **RIGHT OF POSSESSION—SUBSEQUENTLY ACQUIRED TITLE.**—To sustain an action of claim and delivery of personal property the plaintiff must have a right to the immediate and exclusive possession thereof at the time of the commencement of the action, through some general or special property therein, though it is not essential that plaintiff should ever have had actual possession of the property claimed. A subsequently acquired title is not alone sufficient to sustain the action. (*Garcia v. Gunn*, 315.)
2. **SKINS OF WILD GOATS—LEASE OF ISLAND BY MEXICAN GOVERNMENT—TITLE OF ASSIGNEE—ASSIGNMENT WITHOUT CONSENT—BREACH OF CONDITION—SUBSEQUENT CONSENT.**—A lease of an island by the Mexican government to the assignor of plaintiff, conferring a right to utilize the wild goats thereon, with a right of selection for the purpose of killing them in moderation, and containing a condition against assignment of the lease without the consent of the lessor, conferred upon the lessor only the option to forfeit the lease for breach of the condition, and the assignment thereof to plaintiff without previous consent of the lessor was not void, but passed the term to plaintiff, and upon subsequent consent of the Mexican government to the assignment, the assignee took all the rights of the lessee as of the date of the assignment, and became entitled to the immediate and exclusive possession of the skins of wild goats taken from such island subsequent to the date of the assignment. (Id.)
3. **EFFECT OF RESERVATION NOT SELECTED—CONDITION SUBSEQUENT—OPTION OF GOVERNMENT.**—A reservation in the lease of the island of fifty hectares for public user, not designated or selected, but to be decided upon by the Mexican government, has the effect of a condition subsequent at the option of the government; and until the selection should be made by the government, the plaintiff had

CLAIM AND DELIVERY (Continued).

the right to the whole island, and to the control and right of possession of all the goats thereon. (Id.)

4. **TRESPASS AND KILLING OF GOATS — ELECTION OF REMEDY.**—Although the plaintiff might have maintained an action of trespass for the action of trespassers in entering wrongfully upon the island and killing the goats and taking away their skins, he was not confined to that remedy; but such action was an interference with plaintiff's right of possession and control of all of the goats, which entitled him to elect to recover the possession of the skins in an action of claim and delivery; and it is immaterial that plaintiff had not the right to kill all of the goats killed by the trespassers. (Id.)
5. **DAMAGES FOR DETENTION—INTEREST ON VALUE OF PROPERTY.**—Where the judgment allowed one dollar as damages for the detention of the property, it cannot also allow interest on the value of the property from the date of the taking, which, if it could be allowed at all, can only be allowed as damages for the detention. (Id.)

COMMUNITY PROPERTY. See Estates of Deceased Persons, 14.

CONSTITUTIONAL LAW. See Banks, 2-4; Municipal Corporations, 6, 10; Statutes; Taxation, 1, 4.

CONTEMPT.

1. **CONTEMPT OF COURT—NEWSPAPER PUBLICATIONS—REPORT OF EVIDENCE—CRITICISM OF JUDGE—REFUSAL TO PERMIT EVIDENCE—EXCESS OF JURISDICTION—CERTIORARI.**—Where a charge of contempt of court against a publisher of a newspaper alleged the making of publications therein, which were "false, scandalous, and defamatory," and "intended to degrade the said court, and excite public prejudice and odium against it, and were unlawful interferences with the proceedings of the court," and it appears that an account of testimony given in a pending cause was published therein, and that the judge upon his attention being called thereto by an attorney in the cause, stated from the bench that it was a grossly false and fabricated statement, whereupon the newspaper reasserted the truth of the account and declared that the attorney and judge knew it was correct, and severely criticised the judge, and expressed contempt for him for approving "the unmitigated falsehood of an attorney;" and where the defense to the charge of contempt of court was that the publications were in fact true, and not made with any wrongful intent, and that the personal references to the judge were merely in response to his aspersions in characterizing the statements in the newspaper as false and fabricated, when they were in fact true, and that such references were not made with purpose of interfering with the administration of justice; and where the publications were admitted to have been made, and the only testimony in support of the charge was that of the court reporter, to the effect that the matter published did not correspond with his notes of the evidence, and that prior to the sec-

CONTEMPT (Continued).

ond publication he had furnished to the publisher a correct transcript of his notes; and the judge refused to permit the publisher to introduce evidence to prove the truth of the account of evidence published, *held*, that an order adjudging him guilty of contempt of court was in excess of jurisdiction, and should be annulled upon *certiorari*. (*McClatchy v. Superior Court*, 413.)

2. PUBLICATION OF TRUTH AS TO LEGAL PROCEEDINGS—CRITICISM OF JUDGE, WHEN NOT A CONTEMPT OF COURT.—The publication of the truth as to legal proceedings or the criticism of a judge, if made only in response to an unjust charge upon the veracity of the publisher, and without intent improperly to influence the proceedings of the court, does not constitute a contempt of court. (*Id.*)
3. ASPERSIONS BY JUDGE FROM BENCH—RIGHT OF DEFENSE.—A judge on the bench has no more right than any other person to cast aspersions upon the character of a person not a party or participant in a case on trial, without a right in the latter to defend himself. (*Id.*)

See Appeal, 20; Criminal Law, 12; Divorce, 8; Insolvency, 3, 5.

CONTRACT.

1. ACTION FOR LUMBER SOLD AND DELIVERED—SALE OF LAND FOR LUMBER—AGENCY FOR OWNER—CONTRACT FOR BENEFIT OF LUMBER FIRM—SEPARATE AGREEMENTS IN ONE TRANSACTION.—Where a member of a copartnership engaged in the business of buying and selling lands, acting for the benefit of his firm, and also as agent for the sale of a tract of land, effected a sale of the land in his own name to a corporation engaged in the business of manufacturing lumber near to the land, agreeing that the price fixed should be paid in lumber to be delivered to him at specified rates, and on the same day made a separate agreement with the owner of the land reciting that he had acted as agent of the owner in effecting the sale, and that such owner was to be paid for the lumber by him at the rates specified, each lot delivered to be paid for to the owner at those rates ninety days after delivery, with agreed interest, and that the owner was to sell the lumber to him at those rates, and should pay him a commission for effecting the sale, payable in lumber at the rates fixed, the two agreements are to be considered as parts of one transaction, and as binding the firm for whose benefit they were made, and an action will lie in favor of the owner of the land against such firm for lumber sold and delivered to them under the agreement. (*Wolters v. King*, 172.)
2. TIME FOR PAYMENT OF COMMISSION—CONTEMPORANEOUS ORAL AGREEMENT FOR POSTPONEMENT — PAROL EVIDENCE.—Though, as a general rule, a broker or agent for the sale of land for a stipulated commission has earned and is entitled to his commission when he has found a purchaser, able, ready, and willing to take the land at the price and within the time agreed upon, yet where no time for the payment of the commission was definitely agreed upon in the written contract, parol evidence is admissible to show that, contem-

CONTRACT (Continued).

poraneously with the execution of the written agreement, it was orally agreed between the agent and the owner of the land, that the commission, which was to be paid to the agent on lumber, was not to be taken out of the first lumber delivered to him under the contract, but that he was to wait for payment of the commission until all the lumber had been shipped as agreed in the contract, and the owner had received payment for his land. (Id.)

3. LUMBER FIRM BOUND BY ORAL AGREEMENT—APPROPRIATION OF LUMBER FOR COMMISSION—INSUFFICIENT DEFENSE TO ACTION.—Under the circumstances of the case, all of the members of the lumber firm were bound by the terms of the agreement made by one of its members for the benefit of the firm, including the oral agreement made respecting the time for payment of the stipulated commission, and none of them can appropriate the lumber first delivered to them under the contract to the immediate payment of the stipulated commission, or defend an action by the owner of the land against them for the agreed price of such lumber, upon the ground of such appropriation. (Id.)
4. ACTION UPON NOTE—INSUFFICIENT DEFENSE—CONSIDERATION—FRAUD IN SALE OF STOCK OF CORPORATION—TRANSFER OF CORPORATE ASSETS—RESCISSION—INCOMPLETE RESTITUTION.—In an action upon a promissory note, in which the answer pleaded a want of consideration and a total failure of consideration, and alleged that the note was given for the purchase price of shares of stock in a Colorado corporation, of which plaintiff was president and managing agent, and that defendant was induced to purchase the stock by fraudulent representations of the defendant upon which he relied, and that the assets of the corporation were transferred to a new corporation which assumed its liabilities, and that defendant was induced to surrender the original stock purchased and accept the same number of shares in the new corporation in lieu thereof, and that the contract of purchase was rescinded, and said shares of stock tendered back to plaintiff on account of said fraud; but the evidence disclosed that part of the assets of the original corporation were transferred to a dredging company not referred to in the answer, and that the defendant received stock in both corporations, in lieu of the stock purchased, and had sold all of his stock in the dredging company, the defendant could not defeat the action upon the note and retain any part of the consideration, but the tender of all the stock received in both corporations was essential to a rescission or right of rescission of the contract of purchase, and judgment was properly rendered in favor of plaintiff for the amount of the note. (Rohrbacher v. Kleebauer, 260.)
5. REAL ESTATE BROKER—COMMISSIONS UPON SALE—REASONABLE COMPENSATION—PLEADING—GENERAL DEMURRER TO COMPLAINT—AMBIGUITY—TERMS OF EMPLOYMENT.—Where the complaint in an action by a real estate broker for the recovery of commissions upon a sale of real estate alleged employment of plaintiff by defendants,

CONTRACT (Continued).

to sell certain lands, and an agreement to pay him a reasonable compensation for his services, provided he should succeed in selling the same on terms satisfactory to the defendants, and that he found a purchaser who entered into an agreement in writing with the defendants for sale of the lands, in which writing defendants also agreed to pay the plaintiff the regular commissions out of the first moneys received, and the question whether the complaint is ambiguous or uncertain as to the terms of the employment is not raised upon general demurrer to the complaint. (*Lindley v. Fay*, 239.)

6. **CONSTRUCTION OF COMPLAINT—CONTRACT ALLEGED—RECITAL IN WRITTEN AGREEMENT—VARIANCE.**—Only one contract is averred in such complaint, and that is to find a purchaser upon terms satisfactory to the defendants, for a reasonable compensation, and the statements as to the contents of the written agreement between the purchaser and the defendants is a mere recital, which does not help out or vary the terms of the alleged employment; and where there is no proof of the contract alleged, the contract recited in the writing is not, so far as concerns the compensation, the contract averred in the complaint. (*Id.*)
7. **CONTRACT TO PAY COMMISSIONS OUT OF FIRST MONEYS RECEIVED—FAILURE TO CONSUMMATE CONTRACT.**—Under a written contract to pay the commissions of a broker out of the first moneys received, the broker is not entitled to compensation when he finds a purchaser ready, willing, and able to purchase on the prescribed terms; but there must be a sale and a first payment to entitle him to recover; and where the sale was not consummated, by reason of the purchaser not accepting the title, and the alleged contract was not executed so as to bind the parties, and no sale was in fact consummated, and the purchaser invested elsewhere, the broker can recover nothing. (*Id.*)
8. **ORDINARY CONTRACT FOR COMMISSIONS—STATUTE OF FRAUDS—MEMORANDUM.**—Under an ordinary agreement that a broker is entitled to commissions when he furnishes a purchaser, able, ready, and willing to buy, a memorandum in writing, signed by the vendor and disclosing the terms of the contract, is sufficient to satisfy the statute of frauds, though the contract of purchase was not so executed as to bind the parties. (*Id.*)
9. **ASSUMPSIT—QUANTUM MERUIT—INSUFFICIENT DEFENSE—SPECIAL CONTRACT FOR CONSTRUCTION OF LEVEE—NONPERFORMANCE—NON-PAYMENT OF INSTALLMENTS.**—The failure to make agreed monthly payments, under a special contract for the construction of a levee, is a substantial breach thereof by the one for whom it is constructed, and justifies the contractor in refusing to proceed further thereunder; and he may thereupon maintain an action of *assumpsit* upon a *quantum meruit* to recover the value of the work and labor done; and plaintiff's nonperformance of the special contract cannot be maintained as a defense to the action, it appearing that the defendant was first in default. (*San Francisco Bridge Co. v. Dumbarton Land etc. Co.*, 272.)

CONTRACT (Continued).

10. **CONTINUANCE OF WORK AFTER DEFAULT — RELIANCE UPON PROMISES.**—The fact that the plaintiff continued work under the contract after the default of the defendant does not affect the right of the plaintiff to cease work upon continued nonpayment; but plaintiff had the right to rely for a reasonable time upon the promises of defendant to pay. (Id.)
11. **DETERMINATION OF AMOUNT DUE UNDER CONTRACT.**—Where there appears to have been no difficulty in determining the amount due under the contract, the fact that the contract did not expressly provide a specific method of determining the amount due at the end of each month for the work already performed is immaterial. (Id.)
12. **EVIDENCE—IMPORTANCE OF COMPLETION OF CONTRACT IN TIME LIMITED—PRESENT BENEFIT TO DEFENDANT OF WORK DONE.**—The defendant, having first broken the contract by nonpayment of the installments due thereunder, cannot insist that plaintiff should go on and complete the contract within the time specified; and there is no material error in excluding evidence to the point that plaintiff was informed that it was important to construct the levee within the time specified in the contract, nor in excluding evidence on the question whether or not the work done on the levee is of any present benefit to the defendant, and whether the defendant has sustained any loss from the fact that it was not completed within the time specified. (Id.)
13. **VOID CONTRACT—SALES OF STOCKS ON MARGIN—ACTION FOR MONEY PAID—DEFENSE—ACCORD AND SATISFACTION—INSUFFICIENT PROOF—SETTLEMENT OF STOCK ACCOUNT—RECEIPT IN FULL—BASIS OF VALIDITY OF CONTRACT.**—In an action by the assignee of an insolvent debtor to recover money paid by the insolvent debtor to stockbrokers under a void contract for the purchase and sale of stocks on margin, evidence of a mere settlement and receipt in full of the balance of the stock account, consisting of the dealings under the contract for the purchase and sale of the stocks upon a margin, upon the assumption that those dealings were regular and legal, without proof of any agreement to settle any claim for the recovery of the money illegally paid under the void contract, or that such claim was known or considered, or referred to in any manner upon the settlement, does not sustain a defense of accord and satisfaction of the claim sued upon. (*Rued v. Cooper*, 463.)
14. **EVIDENCE—IGNORANCE OF LEGAL RIGHTS.**—In such action, it is error to refuse to permit the insolvent debtor to answer a question as to whether he knew of any law authorizing the recovery of money paid in on margin stock transactions at the time of signing the receipt in full of the balance of stock account; nor is it a valid objection to such question that the witness was presumed to know the law, and could not be excused for ignorance of it. (Id.)
15. **MAXIM—IGNORANCE OF LAW—EXCEPTION—MISTAKE OF FACT ARISING FROM MISTAKE OF LAW—RELIEF IN EQUITY.**—The maxim, *ig-*

CONTRACT (Continued).

ignorantia legis neminem excusat, though applicable generally to mistakes of law pure and simple, does not apply to the exceptional case where a party has acted in ignorance of his antecedent and existing private legal rights, and under a misapprehension which involves a mistake of facts arising out of a mistake of law as to the existence of a legal right or title, which there could not have been an intention to part with, while in ignorance of it; but, in such case, equity will grant relief from the legal effect of instruments which surrender such unsuspected right or title. (Id.)

16. **CODE PROVISIONS—IGNORANCE OF FACT—MISAPPREHENSION OF LAW—LIMITED EFFECT OF GENERAL RELEASE.**—A settlement with stock-brokers and receipt in full of a balance of the stock account, made in ignorance of a legal right to recover moneys paid to them for the purchase and sale of stocks on margin, if regarded as involving a mistake of fact, involves unconscious ignorance of a fact material to the contract, within subdivision 1 of section 1577 of the Civil Code, and, if regarded as involving a mistake of law, involves a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law, within section 1578 of the Civil Code; and regarding the receipt as a general release, it could not, under section 1542 of the Civil Code, extend to claims which the creditor did not know or suspect to exist in his favor at the time of executing the release which, if known by him, must have materially affected his settlement with the debtor, nor is it material that his ignorance of the fact of its existence was occasioned by his ignorance of law. (Id.)
17. **SERVICES IN OBTAINING RENEWAL OF LEASE—ORAL AGREEMENT FOR COMPENSATION—DELIVERY OF LEASE FOR LESS TERM—PRIOR WRITTEN CONTRACT—MERGER—ESTOPPEL.**—An oral agreement made between plaintiff and defendants that plaintiff should use his services in obtaining the renewal of a ten-year lease, which was about to expire, in consideration of a monthly payment to be made to plaintiff during the renewed term, the desire being expressed for a new lease of ten years, is merged in a written contract to pay such compensation for a shorter term of three years, which was entered into prior to the delivery of a new lease therefor, which had been executed by the lessor and placed in the possession of plaintiff, and which he was under no obligation to deliver, unless such written contract was made; and the essential act of the delivery of the lease remaining to be performed when the written contract was entered into, his entire service in procuring a new lease, which was one transaction, must be deemed to have been made under the written contract, and defendants are estopped by such contract from objecting that the services were rendered under a different oral agreement, and that plaintiff could only recover upon a *quantum meruit*, and not under the written contract, and from objecting that the lease delivered to and accepted by them was not in accordance with the terms of the contract. (Ryer v. Oosting, 564.)

CONTRACT (Continued).

18. **SURRENDER OF LEASE—CONTINUANCE OF OBLIGATION TO PLAINTIFF.** The terms of the contract being to pay a monthly compensation during the period for which the premises were leased, the defendants could not escape their obligation to make such monthly payments, by surrender of the lease before the expiration of the term. (Id.)

See *Jury and Jurors*; *Mechanic's Lien*; *Municipal Corporations*, 1, 2, 7; *Parent and Child*; *Pleading*; *Quieting Title*, 1; *Sale*; *Specific Performance*.

CORPORATIONS.

1. **SERVICES OF PRESIDENT—AMOUNT OF COMPENSATION—CONFLICTING EVIDENCE — APPEAL.** — In an action involving a dispute as to the amount of compensation which the president of a corporation was entitled to receive for his services rendered to the corporation, a finding in favor of the amount claimed by him, based upon the terms of his original employment by the corporation, and upon his testimony that those terms continued in force during his employment, cannot be disturbed upon appeal, upon the ground that his testimony was contradicted by evidence that he agreed with the principal stockholder to take less compensation. (*Bushnell v. Simpson*, 658.)
2. **ASSUMPTION OF DEBTS OF CORPORATION — EVIDENCE — PRIVATE BOOKS OF ACCOUNT OF PRESIDENT—BALANCE TO BE DEDUCTED FROM SALARY.**—In an action by the president of a corporation to recover the balance of salary due him from the corporation against a defendant to whom the property of the corporation had been transferred, and who had assumed to pay its debts, where the plaintiff, after having introduced the records of the corporation to show the amount of salary agreed to be paid him, had testified that he had performed the duties of that office until the transfer was made to the defendant, that during that time he had paid out money for the corporation, and had purchased coal from it, and drawn money from it in various amounts, and that he had kept a book in which all accounts between him and the corporation were entered, including his salary as president, such book is admissible in evidence where the only objection made to it is that the books of the company are the proper books to be offered in evidence; and though it could have no weight in determining the amount of salary he was to receive under express contract with the corporation, yet it was proper and material to show the other items of account and what balance was to be deducted from the salary due him. (Id.)
3. **HARMLESS RULING—CORPORATION BOOKS.**—Where the corporation books were afterward introduced in evidence, and no disagreement was at any time pointed out between the private books of account of the president and those of the corporation, the reception of the books of account kept by the plaintiff cannot be said upon appeal to have caused the defendant any injury. (Id.)
4. **IMPROPER CROSS-EXAMINATION—ASSUMPTION OF FACTS NOT PROVEN.** Where the plaintiff was asked by the defendant upon cross-examina-

CORPORATIONS (Continued).

tion how it was that everybody went to the defendant to fix those salaries, and it appeared that it was not proper cross-examination, and it did not appear in evidence that any persons went to the defendant to fix their salaries, but the question assumed facts that did not appear, an objection to the question based upon each of those grounds is properly sustained. (Id.)

5. **COUNTERCLAIM—ACCOUNT STATED—FAILURE OF EVIDENCE — FINDING.**—Where the real controversy between the parties was as to the amount of compensation which plaintiff was entitled to receive for his services, and there was no dispute as to the balance of other accounts to be deducted from the amount of salary to be received by him as president of the corporation, a finding in favor of the plaintiff for the amount claimed is a finding against a counterclaim upon an account stated between plaintiff and the corporation, and where there is no evidence that a final balance of account, including the salary, was stated between the corporation and the plaintiff, the counterclaim cannot be sustained. (Id.)

See Banks; Church; Contract, 4; Home for Inebriates; Mines and Mining; Municipal Corporations; Mutual Benefit Society; Trust, 1.

COSTS. See Mortgage, 23.

COUNTERCLAIM. See Estates of Deceased Persons, 16-18; Statute of Limitations, 1, 2.

COUNTY.

1. **COUNTY ORDINANCE—LICENSE TO PERSONS ENGAGED IN SHEEP BUSINESS — VALIDITY — CONSTRUCTION OF COUNTY GOVERNMENT ACT.**—A county ordinance requiring the procurement of a license by "every person engaged in the business of raising, grazing, herding, or pasturing sheep in the county," is valid, and within the power conferred upon boards of supervisors under subdivision 27 of section 25 of the County Government Act of 1893, authorizing them "to license for purposes of regulation and revenue all and every kind of business not prohibited by law and transacted and carried on within the county," and it is no objection to the validity of the ordinance that it uses the words "engaged in," instead of the words "transacted and carried on" employed in the act, as each form of expression involves the other in its meaning. (County of Inyo v. Erro, 119.)
2. **APPLICABILITY OF ORDINANCE — PASSAGE OF SHEEP THROUGH COUNTY—GRAZING AND PASTURAGE—QUESTION OF FACT—FINDINGS —CONFLICT OF EVIDENCE.**—Though such ordinance is not applicable to one who merely drives a band of sheep through a county, yet the license tax cannot be evaded, when it is evident that the real object in so doing, and what is really done is to graze and pasture the sheep in the county, and the determination of what is the real object

COUNTY (Continued).

is a question of fact; and where the trial court finds as a fact, under conflicting evidence, that for a period of time the defendant was engaged in the business of raising, grazing, herding, and pasturing sheep in the county, its findings will not be disturbed upon appeal. (Id.)

See Swamp Lands.

COVENANT. See Mortgage, 7; Public Officers.

CRIMINAL LAW.

1. **HABEAS CORPUS — UNLAWFUL COMMITMENT OF MINOR TO WHITTIER STATE SCHOOL — CHARGE OF BURGLARY — ABSENCE OF JURY TRIAL — FAILURE TO NOTIFY PARENTS.**—Where a minor was accused before the grand jury of the crime of burglary, and, upon recommendation of the grand jury, was committed by the superior court to the custody of the Whittier State School, without trial by jury, and upon evidence taken before the court, in the absence of his parents, who were not notified of the hearing, such commitment is void, and the minor must be discharged upon *habeas corpus* from the custody of the superintendent of said state school, and restored to the custody of his parents. (Ex parte Becknell, 496.)
2. **ACCUSATION OF CRIME—RIGHT TO JURY TRIAL—CHANGE OF GUARDIANSHIP OF MINOR—PARTIES.**—A minor accused of crime cannot be committed as a criminal to the Whittier State School without a trial by jury; nor can such minor be awarded to the guardianship of such school, as against his parents, who are his natural guardians, except in a proceeding in which they are made parties, and in which it is shown that they are unfit, or unwilling, or unable to perform their parental duties. (Id.)
3. **JURISDICTION OF JUSTICE'S COURT—REFUSAL TO CHANGE PLACE OF TRIAL — AFFIDAVIT OF PREJUDICE AND BIAS — APPEAL — HABEAS CORPUS.** — A justice's court is not ousted of jurisdiction to try a defendant accused of misdemeanor by the mere filing of an affidavit of the defendant that he had reason to believe and did believe that he could not have a fair and impartial trial before the justice by reason of his prejudice and bias, and any error committed by the judge in refusing to change the place of trial on that ground, must be remedied by appeal from the judgment, which is not void, and *habeas corpus* does not lie. (Ex parte Wright, 401.)
4. **APPEAL — REVIEW OF MOTION TO SET ASIDE INDICTMENT — BILL OF EXCEPTIONS.** — An order denying a motion to set aside an indictment is not appealable; but such order may be reviewed upon appeal from the judgment, where the proceedings are brought up by a bill of exceptions. (People v. Simmons, 1.)
5. **DISQUALIFICATION OF GRAND JUROR—CHALLENGE TO PANEL—LEGALITY OF INDICTMENT—ABSENCE OF GRAND JUROR.**—The disqualification of an individual grand juror is not ground for a challenge to the panel; nor can the absence of a grand juror, whether qualified or disqualified, during the consideration of a case by the

CRIMINAL LAW (Continued).

grand jury, affect the validity or legality of its action; and an indictment cannot be set aside for the disqualification of a juror, in the finding of which he took no part. (Id.)

6. **PLEADING—INFORMATION FOR FELONY—ABSENCE OF CONCLUSION CONTRA FORMAM STATUTI — MOTION IN ARREST OF JUDGMENT.** The failure of an information for felony to allege that the acts which constituted the felony were done "contrary to the force and effect of the statute in such cases made and provided," no demurrer having been interposed to the information upon that ground, does not go to the jurisdiction of the court, nor disclose a failure to state a public offense, and is not ground for a motion in arrest of judgment. (People v. Taylor, 113.)
7. **SENTENCE OF DEATH — ERRONEOUS ORDER FIXING DAY FOR EXECUTION — STAY OF PROCEEDINGS — HABEAS CORPUS — PENDENCY OF APPEAL FROM FEDERAL COURT—PRESUMPTION — ABSENCE OF PROOF OF FINAL DECISION.**—An appeal to the supreme court of the United States from an order of the circuit court refusing an application for a writ of *habeas corpus* by a prisoner under sentence of death for murder, stays the hands of the state and of the state authorities during its pendency; and it being established from the records of the circuit court that such an appeal was taken, and is pending so far as disclosed by those records, it will be presumed to be still pending, until the presumption is overcome by legal proof, and, where there was no legal evidence of a final decision of such appeal before the superior court, its order fixing a day for execution of the prisoner is erroneous and reversible upon appeal. (People v. Durrant, 54.)
8. **APPEALABLE ORDER — INSUFFICIENT TIME ALLOWED FOR BILL OF EXCEPTIONS—ABUSE OF DISCRETION.**—An order fixing a day for execution of a prisoner under previous sentence of death is appealable; and where such order so limits the time appointed for the death as not to allow the defendant the time guaranteed by law in which to prepare and present his bill of exceptions, it is in violation of his rights, and is a gross abuse of discretion. (Id.)
9. **HABEAS CORPUS—FEDERAL QUESTION—APPEAL FROM FEDERAL COURT —STAY OF PROCEEDINGS.**—Where a petition to a circuit or district court of the United States for a writ of *habeas corpus* on behalf of a prisoner in the state's prison, who is under penalty of death for murder by sentence of a state court, presents a federal question, an appeal to the supreme court of the United States from an order either remanding the petitioner or refusing him a writ, stays all further proceedings by the state courts or by the state authorities pending the appeal, and by operation of section 766 of the United States Revised Statutes, any such further proceedings, until the determination of the appeal, are null and void. (Ex parte Edgar, 123.)
10. **VALIDITY OF PROCEEDING BY INFORMATION — QUESTION UNDER FEDERAL CONSTITUTION.**—The question whether a proceeding by information, instead of indictment, is in violation of the constitution of the United States, is a federal question; and is none the less such

CRIMINAL LAW (Continued).

because former cases have been decided by the supreme court of the United States contrary to the contention of one who raises such question by petition to a federal court for a writ of *habeas corpus*, and by appeal to the supreme court of the United States from an order denying the writ. (Id.)

11. **STAY—MERIT OF APPEAL NOT TO BE CONSIDERED — ALLOWANCE OF APPEAL—PROOF OF FEDERAL QUESTION.**—Where a federal question is presented, upon a petition for a writ of *habeas corpus*, in a federal court, and an appeal has been taken from an order denying the writ, it is the appeal, and not the merit of the appeal, which operates as a stay; and the very fact that an appeal has been allowed by the federal court, after deciding the question presented pursuant to previous decisions of the supreme court of the United States, is equivalent to a declaration of that court that a federal question was presented, and the appeal allowed must operate as a stay. (Id.)
12. **VOID CONTEMPT PROCEEDINGS AGAINST ACTING WARDEN OF STATE'S PRISON—DISCHARGE UPON HABEAS CORPUS.**—The acting warden of the state's prison is not in contempt of the authority of the state court ordering the execution of a prisoner under sentence of death, in deferring such execution pending an appeal to the supreme court of the United States from an order of a district court of the United States refusing a writ of *habeas corpus* to the prisoner; and, if imprisoned for contempt for so doing by order of the state court, will be discharged upon *habeas corpus*. (Id.)
13. **LAW — ASSAULT WITH INTENT TO COMMIT CRIME AGAINST NATURE—SUFFICIENCY OF EVIDENCE—QUESTIONS FOR JURY.**—Upon the trial of a defendant accused of an assault with intent to commit the infamous crime against nature, where there is evidence tending to show that defendant, after having unsuccessfully solicited consent to the act by the person upon whom the alleged assault was made, grabbed him and tried to roll him over; that he resisted and made some noise, and the defendant then desisted, and said he would not make him do it if he didn't want to, it is a question of fact for the jury whether the force testified to was used, and also what was the intent with which it was done, and the evidence was sufficient, if believed by the jury, to justify the conclusion that whatever force was used was with the intent and purpose to commit the crime alleged; and if any appreciable force was used with that intent, and the defendant desisted through fear of detection from any cause, the intended act being felonious and against the will of the prosecuting witness, it was an assault within the meaning of the Penal Code defining an assault, and defining the crime for which the defendant was prosecuted. (People v. Wilson, 384.)
14. **FEAR NOT ESSENTIAL TO ASSAULT—FEELINGS AND MOTIVES OF PROSECUTING WITNESS—SUPPORT OF VERDICT — RECOMMENDATION TO MERCY.**—It was not essential to the offense charged that the assault should have put the person assaulted in fear, and the questions whether his feelings were not sensitive and were not

CRIMINAL LAW (Continued).

greatly outraged, and whether the fact that no bodily injury was inflicted may suggest the possibility of some improper motive for the prosecution on his part, are questions for the jury; and it is sufficient to support a verdict of guilty of the offense charged, with a recommendation of the defendant to the extreme mercy of the court, that there was legal evidence upon which the verdict could be sustained, and that the recommendation made by the jury negatives the idea of passion or prejudice on their part. (Id.)

15. **BURGLARY — EVIDENCE — OWNERSHIP OF TRUNK CONTAINING STOLEN PROPERTY — PREVIOUS BURGLARY AND THEFT OF TRUNK — CLAIM—POSSESSION OF CONTENTS.**—Upon the trial of a defendant accused of burglary with intent to commit larceny, where there was evidence for the prosecution showing that a burglarious entry had been made into a house by two men, and that a trunk standing in the hall had been rifled by them, and clothing, an album and jewelry taken therefrom, it was proper for the prosecution to prove, as corroborative evidence, that defendant was the owner of a trunk in which most of the stolen property was found; and even if the record had disclosed that defendant had been prosecuted upon another charge of burglary wherein it was alleged that he had stolen the trunk, it would still be competent to show that he owned or claimed the trunk in question, as furnishing evidence of possession of its contents. (People v. Sears, 267.)
16. **SUFFICIENCY OF EVIDENCE — ALIBI — PROVINCE OF JURY.**—Where the evidence for the prosecution showed that the stolen clothing, album, etc., were found in a trunk kept by defendant in a barn owned by another person, and that some of the stolen jewelry was found in his pockets, and that the burglary occurred between 10 and 11 o'clock at night, and there was evidence for the defendant tending to prove that defendant was elsewhere employed until about 11 o'clock on that night, and defendant attempted to account for his possession of the stolen property by saying he was a junk dealer, and that on the next morning he found the goods in a gunny-sack standing against a tree on the corner of two streets, and that he put them in the barn because he was afraid the woman with whom he lived near the barn would take them, the jury was the sole judge as to the guilt or innocence of the defendant, and may have disbelieved the testimony tending to prove an alibi, or that there was a mistake as to the hour when he quit work, or as to the time of the burglary, and their verdict cannot be disturbed upon appeal for insufficiency of the evidence to support it. (Id.)
17. **CROSS-EXAMINATION OF DEFENDANT—IMPROPER QUESTIONS—HARMLESS ACTION OF PROSECUTING OFFICER—RULINGS OF COURT.**—Where some of the questions put to the defendant upon his cross-examination were improper, but were of little moment, and objections thereto were sustained by the court, and when any of them were answered without objection, the answer was stricken out by the court and the jury instructed to disregard such testimony, no inju-

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ry resulted from such improper questions, and a judgment of conviction of the defendant will not be reversed for alleged misconduct of the prosecuting officer in asking them. (Id.)

18. **IMPEACHMENT OF DEFENDANT—PREVIOUS CONVICTION OF FELONY.**—Although it is not proper to show that the defendant was guilty of some other offense, for the purpose of raising a presumption, either of law or fact, of his guilt in the case under consideration, yet, when a defendant offers himself as a witness in his own behalf he may be asked, for the purpose of impeaching his evidence, if he has been convicted of a felony, or the fact, if it exists, may be shown by the record of the judgment. (Id.)
19. **ABDUCTION OF FEMALE MINOR FOR PROSTITUTION—JURY—CHALLENGE TO PANEL — SHERIFF AS WITNESS FOR PROSECUTION.**—Upon the trial of a defendant accused of having taken a female under the age of eighteen years away from her father without his consent, for the purposes of prostitution, it is not ground for challenge to the panel of the trial jury that the sheriff who served the venire was examined as a witness for the people upon the preliminary examination of the defendant, where the sheriff testified that he had no bias against the prisoner. (People v. Slater, 620.)
20. **HOUSE OF ILL-FAME—MODIFICATION OF INSTRUCTION.**—An instruction requested by the defendant as follows: "If you find from the evidence that the house where the defendant took the girl is only a house where one woman lives, then I charge you that such a house is not a house of ill-fame," is properly modified by adding the words, "unless it is used for the purposes of prostitution." (Id.)
21. **INSTRUCTION AS TO PURPOSE OF STATUTE.**—An instruction containing a brief statement of the purpose or intention of the statute, and that it was "for the protection of females under a certain age," though unnecessary, is not materially objectionable, where the jury were elsewhere distinctly told that it applied to "females under the age of eighteen years." (Id.)
22. **ILLUSTRATIVE INSTRUCTIONS—ASSUMPTION OF FACTS — HARMLESS ERROR.**—Instructions containing statements of inferences or conclusions of fact, from other facts stated or assumed to exist, should not be given, but where it appears that such instructions were merely intended as illustrations and not as facts proved in the case, and are followed by a proper and specific instruction clearly submitting all the essential facts in the case to the jury, so that they could not be misled by the illustrative instruction, any error in giving them is without prejudice to the defendant. (Id.)
23. **SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY—CHARACTER OF HOUSE—INTENTION OF MARRIAGE.**—Where the character of the house to which the girl was taken by the defendant was clearly established, and there is ground for the conclusion that he took her away for the purpose of prostitution, notwithstanding the testimony of the defendant that he intended to marry her "as soon as he got money enough," the question involved is one of fact for the jury to

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determine from the whole evidence, and their verdict of guilty will not be disturbed for insufficiency of the evidence to show that the defendant intended to use the girl as a prostitute. (Id.)

24. **EVIDENCE—PROOF OF AGE—FAMILY BIBLE—EXPLANATORY EVIDENCE—QUESTION FOR JURY.**—A family Bible as admissible in evidence upon the question of the age of a child; and where the condition of the entry of birth requires explanation, the entry and explanation are properly submitted to the jury, and will not be considered upon appeal, especially where the positive testimony of the parents as to the age of the child is sufficient independently of the family record. (Id.)
25. **DEFRAUDING INNKEEPER — STATUTE NOT REPEALED — HABEAS CORPUS.** — The act of March 1, 1889, adding a new section to the Penal Code, known as section 537, relating to defrauding proprietors and managers of hotels, inns, restaurants, boarding-houses, and lodging-houses, was not repealed by an amendment to another section 537 of the Penal Code established by the act of March 10, 1887, relative to personal property mortgaged, such amendatory act relating to the subject matter of the removal, sale, or subsequent encumbrance of mortgaged chattels; and a person convicted of the crime of defrauding an innkeeper under the act of March 1, 1889, subsequent to said amendatory act, cannot be released upon *habeas corpus*, upon the ground that the act defining the crime was repealed, nor upon the ground that the act of March 1, 1889, was unconstitutional. (Ex parte Ruffin, 487.)
26. **OBTAINING MONEY UNDER FALSE PRETENSES — ASSIGNMENT OF NOTE AND MORTGAGE — MISREPRESENTATIONS AS TO MORTGAGED PROPERTY—RESPONSIBILITY OF MAKER OF NOTE—SUFFICIENCY OF INDICTMENT.** — An indictment charging the defendant with the obtaining of money under false pretenses, from the purchaser of a note and mortgage, sold by the defendant with intent to cheat and defraud such purchaser of her money, and under the false and fraudulent representation that the mortgaged land was good tillable land, of good soil, and of great value, and sufficient as security for the payment of the note, and the false and fraudulent pointing out of lots of land of that character which were not included in the mortgage, whereby the purchaser, having no knowledge of the facts, and believing the truth of such pretenses, was induced to make the said purchase and part with her money therefor to the defendant, whereas in truth and in fact the lots described in the mortgage were not good or tillable land or of any value, or sufficient as security for the payment of any sum whatever, and were not the lots so pointed out, as defendant then and there well knew, etc., sufficiently states an offense, and it is error to sustain a demurrer to such indictment, upon the ground that it does not state that the maker of the note was unable to pay the same, or that has not been paid. (People v. Bryant, 595.)
27. **PROPERTY OBTAINED BY FRAUDULENT PRETENSES NEED NOT BE LOST.** If a person is induced to part with property by reason of fraudulent pretenses and misrepresentations, he is thereby defrauded of

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the property so parted with, even though he may eventually make himself whole in some mode not then contemplated; and it is not necessary to show that the property has been absolutely lost to him, or that he cannot recover its value in a civil action, in order to sustain the charge. (Id.)

28. **FALSE REPRESENTATIONS INDUCING PAYMENT OF MONEY.**—Whether the false and fraudulent representations made by the defendant did in fact induce the purchaser of the note and mortgage to part with her money is one of the elements of the charge to be established at the trial; but if established to the satisfaction of the jury, and shown to have been false and fraudulent, and made by the defendant knowingly and designedly, she was defrauded of her property by the defendant by means of these representations. (Id.)
29. **FALSE IMPERSONATION OF OFFICER—INSUFFICIENT INFORMATION—CONSTRUCTION OF CODE.** — Section 529 of the Penal Code, which provides for the punishment of “every person who falsely personates another,” etc., does not apply to a case where a party falsely assumes an official character, but is intended to cover only acts done by one person while representing himself to be another and different person; and an information charging a defendant with impersonating an officer of the law and a constable, and performing a specified act in such assumed character, without stating the name of the officer of the law or constable which defendant represented himself to be, is insufficient. (*People v. Knox*, 73.)
30. **AMBIGUOUS INFORMATION.**—The mere fact that an information is susceptible of widely different constructions renders it unsatisfactory in the eyes of the law. (Id.)
31. **MAKING FICTITIOUS CHECK — PLEADING — SUFFICIENCY OF INFORMATION — NONEXISTENCE OF PRETENDED MAKER — UNCERTAINTY—WAIVER OF OBJECTION.**—An information charging the defendant with making and forging a fictitious check, payable to his order, and indorsing the same with intent to defraud a person named “whereas in truth and in fact there was and is no such bank, corporation, copartnership, or individual,” as the assumed maker of the check, as defendant “then and there well knew, and that the said instrument was fictitious,” sufficiently states a public offense; and the most that can properly be said in reference to the question as to what time the expression “was and is” relates is that that expression is lacking in the requisite certainty, but such objection can only be taken by demurrer, and when not so taken is waived, and cannot avail the defendant upon appeal from the judgment. (*People v. Ellenwood*, 166.)
32. **SECOND COUNT IN INFORMATION—JOINDER OF OFFENSES—REFERENCE TO FIRST COUNT NOT PERMISSIBLE.**—An information which in fact contains two counts, should charge the defendant in the second count as if he had committed a distinct offense, it being upon the principle of the joinder of offenses that the joinder of counts is admitted; and such information cannot omit material allegations

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and import them from the first count by referring to them by the use of the word "said." (Id.)

33. **CHARGE OF MAKING AND PASSING FICTITIOUS NOTE IN ONE COUNT.** Although either the making or the passing of a fictitious check with intent to defraud the same person would constitute an offense under section 476 of the Penal Code; yet when referring to the same instrument, and charging the same intent they constitute but one offense, and may be properly charged in a single count; and in such case there is neither necessity nor propriety in repeating the allegations of the making of the check, and of the nonexistence of the fictitious person whose name is signed to the check in connection with the allegation of the passing of the check. (Id.)
34. **IMPROPER INSTRUCTION—INCORRECT STATEMENT OF EVIDENCE—UNAUTHORIZED CONCLUSION OF FACT.**—Where the defendant testified that he met Dalton, the maker of the note, in San Francisco, had known him in Los Angeles, and that he resided in New York; evidence for the prosecution that his name was not in the directory of San Francisco, and the testimony of a policeman that the defendant told him that there was no such man in San Francisco, are consistent with the testimony of the defendant; and a statement in the charge of the court referring to the testimony of the policeman, that the prosecution, "have brought here a witness who undertakes to tell you that the defendant admitted to him that Dalton was a mere fiction," is not a statement of the evidence, but of an unauthorized conclusion of fact drawn by the court from the evidence, and is in violation of the constitutional provision that "judges shall not charge juries with respect to matters of fact." (Id.)
35. **PRELIMINARY EXAMINATION — POSTPONEMENT WITHOUT CONSENT OF DEFENDANT — JURISDICTION TO COMMIT.** — Any error committed in the postponement of a preliminary examination, on motion of the prosecution, for more than six days, without the consent of the defendant, in violation of section 861 of the Penal Code, in order to secure the attendance of witnesses for the prosecution, who appeared and testified at the adjourned examination, does not affect the jurisdiction of the magistrate to commit the defendant upon probable cause shown therefor. (People v. Van Horn, 323.)
36. **MOTION TO SET ASIDE INFORMATION — ERROR NOT REVIEWABLE.**—A motion to set aside an information on the ground that the defendant had not been legally committed by a magistrate, is not in the nature of an appeal from the order of commitment by the magistrate; and mere errors alleged to have occurred at the preliminary examination cannot be reviewed on such motion. (Id.)
37. **APPEAL — DEFECT IN PRELIMINARY EXAMINATION — SUBSTANTIAL RIGHT.**—A defendant, who has been convicted by a jury in the superior court after a fair trial upon an information, cannot avoid the verdict for any reason founded on an alleged defect in the preliminary examination and commitment, unless by such defect he was deprived of some substantial right. (Id.)

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38. **CONSTRUCTION OF CODE — TEMPORARY ILLEGAL CONFINEMENT — FAILURE TO USE REMEDY—ABSENCE OF LEGAL PREJUDICE.**—Section 861 of the Penal Code is intended to protect a party from loss of liberty for an unreasonable time under the pretext of a criminal charge against him; and if the defendant should be freed from custody because held without his consent more than six days before preliminary examination, he could be rearrested upon another complaint, and if he remained in temporary illegal confinement, without using any remedy therefor, the mere postponement of the hearing does not affect the jurisdiction of the magistrate to hold a preliminary examination of the defendant then in custody, and if the examination then proceeded to a commitment based on probable cause, the defendant has suffered no material prejudice in the matter of the commitment, and has suffered no legal prejudice because at the time to which the examination was continued witnesses for the prosecution, whose attendance could not be procured within the six days, appeared and testified. (Id.)
39. **HOMICIDE—ARREST OF DECEASED—DEATH FROM HOSTILE MOB—EVIDENCE—ANTICIPATION OF DEFENSE.**—Where it appeared that defendants accused of murder had arrested the deceased upon a charge of murder, and that deceased was shot and hung upon a mountain trail in a sparsely settled country, and that the defendants relied upon the defense that the deceased had been taken from their custody and killed by a hostile mob, and there was ample evidence to warrant the jury in finding the defendants guilty of the killing, unless it was done by a mob as claimed by them, it was not error to permit the prosecution to anticipate the declared defense by calling a number of persons who lived within several miles of the place of the homicide as witnesses, to prove their absence at the time of the killing, and that there could not have been a mob on the trail where the killing was done. (Id.)
40. **TESTIMONY AS TO CONSPIRACY AND ACTS OF CONSPIRATORS—DECLARATIONS OF THIRD PERSON SHOT—ORDER OF EVIDENCE—INNOCENCE OF DECEASED.**—Where there was evidence tending to show a prima facie case of conspiracy between the defendants and a few other persons, and that the homicide was the result of such conspiracy, the order in which the evidence as to the conspiracy and the acts of the conspirators should be proved was in the discretion of the court; and when the subsequent acts of the alleged conspirators made the statements of the person alleged to have been shot by the deceased admissible, the order in which such evidence was received was immaterial; and it was permissible to permit the prosecution to show that such person made differing statements, and to offer evidence tending to show that the deceased did not shoot such person. (Id.)
41. **LETTER FOUND UPON PERSON SHOT—IMMATERIAL EVIDENCE — REFUSAL TO PERMIT STATEMENT OF CONTENTS—HARMLESS RULING.**—The address and contents of a letter found upon the person alleged

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to have been shot by deceased, and which was buried with his body, are immaterial, and could not be pertinent to the guilt or innocence of the defendants; and it cannot be prejudicial or reversible error for the court to refuse to permit defendants to state the contents of such letter in their offer of proof. (Id.)

42. **IMPANELING JURY — ILLNESS AND DISCHARGE OF JUROR — SELECTION OF NEW JUROR.**—Under section 1123 of the Penal Code, a juror may be discharged on account of sickness after the jury has been impaneled and before the introduction of evidence; and another juror may then be regularly drawn, examined, accepted, and sworn. (Id.)
43. **INSTRUCTION — MODIFICATION — VERBAL ADMISSIONS OF PARTY — CAUTION—PROVINCE OF JURY—REVIEW UPON APPEAL.**—An instruction requested by the defendants to the effect that the verbal admissions of a party should be received "with great caution" is properly modified by striking out the word "great"; and where such requested instruction contained matter of encroachment upon the province of the jury, for which it might have been refused, defendants cannot complain upon appeal of error of the court in giving it. (Id.)
44. **INSTRUCTIONS ALREADY GIVEN— INAPPLICABLE INSTRUCTIONS.**—Instructions requested upon the subject of reasonable doubt, upon which the court had already fully instructed the jury, and instructions requested as to disregarding statements of the prosecuting attorney of facts not proved, not called for by anything appearing in the record, are properly refused. (Id.)
45. **NEW TRIAL — DRINKING OF LIQUOR BY JURORS—REQUEST OF SHERIFF—TRIVIAL OCCURRENCE.**—The mere casual drinking of a small quantity of liquor by some of the jurors just before supper, at request of the sheriff, and after one of the jurors had invited another to take a drink, where it appears that no one of them was intoxicated, or affected in any way by what they drank, is too trivial an occurrence to constitute ground for a new trial. (Id.)
46. **HOMICIDE — PARTIAL INSANITY — INSANE DELUSIONS — MEDICAL OPINIONS — MATTERS OF FACT — INSTRUCTIONS.**—Matters of medical science and medical opinions bearing upon the question of partial insanity are to be proved as matters of fact, and are not propositions of law, though embodied in legal treatises and judicial opinions, and it is error to instruct upon them as a matter of law, or to instruct the jury that if the defendant entertained certain special beliefs which the defense claimed constituted the delusion which impelled the defendant to commit the homicide, and they were unsound, existing only in his imagination, then they were insane delusions, as matter of law. (People v. Hubert, 216.)
47. **REBUTTING EVIDENCE — GENERAL AND PARTIAL INSANITY.**—Where there was evidence for the defendant tending to prove both his general and partial insanity, the prosecution may give in rebuttal as to either the testimony of acquaintances of the defendant; and in rebuttal of partial insanity the prosecution may show that the defendant was in other respects sane. (Id.)

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48. **TESTIMONY OF BUSINESS ACQUAINTANCE—FOUNDATION FOR OPINION—DISCRETION.**—It is largely in the discretion of the court to determine whether the business acquaintance and conversations had by a witness with the defendant were a sufficient foundation to enable him to testify that in his opinion the defendant was sane as a business man. (Id.)
49. **EFFECT OF INSANE DELUSIONS, COMBINED WITH GENERAL SANITY—INSUFFICIENT DEFENSE—DELUSION AS TO POISON—UNJUSTIFIABLE HOMICIDE.**—If the defendant had insane delusions which completely possessed him, but was sane on all other subjects, then he must be judged as though the facts with respect to which the delusions existed were real; and where these facts do not constitute a defense to the homicide, the defendant cannot be justified on account of the existence of the insane delusions; and an insane delusion of a defendant accused of the murder of his wife, that she had put poison in his food, of which he stated that he was going to procure a test, cannot, if the fact existed, justify the homicide. (Id.)
50. **IMPROPER REQUEST FOR INSTRUCTIONS AS TO JUSTIFICATION OF HOMICIDE.**—Instructions requested by the defendant upon the subject of justification of the homicide on the ground of insane delusions, giving him a right of self-defense, are properly refused, where there is no evidence tending to establish a delusion as to facts which, if they had been as he believed they were, would not constitute such jeopardy as would justify the homicide, and where the instructions asked are incorrect even if there had been such evidence. (Id.)
51. **MODIFICATION OF ERRONEOUS REQUEST — WEIGHT OF EVIDENCE — TEST OF RESPONSIBILITY.**—An instruction requested by the defendant, which bears upon the weight of evidence and contains a test of responsibility for crime which is incorrect, should properly be refused; and the defendant cannot complain of a modification which states the correct rule of responsibility. (Id.)
52. **IMPROPER REQUEST FOR INSTRUCTION AS TO INSANITY—WEIGHT OF EVIDENCE—IRRESISTIBLE IMPULSE—CORRECT RULE.**—A proposed instruction which is partly upon the weight of evidence, and which embodies the proposition that an insane irresistible impulse is a defense to a criminal charge, is properly rejected, the true rule being that notwithstanding the act was the offspring of irresistible impulse, and the impulse was irresistible because of mental disease, still the defendant must be held responsible if he at the time had the requisite knowledge as to the nature and quality of the act, and of its wrongfulness. (Id.)
53. **HARMLESS REFUSAL OF REQUEST—PRESUMPTION OF INNOCENCE OF MURDERED WIFE.**—The refusal of the court to instruct the jury that it must be presumed that the wife of the defendant, who was killed by him, did not attempt to poison him, is harmless, where it is conceded that the charge was false, and where it appears that the delusion of the defendant as to such attempt did not constitute a defense under the admitted facts. (Id.)

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54. **REASONABLE DOUBT—HARMLESS ATTEMPT TO EXPLAIN.**—An instruction telling the jury that a reasonable doubt is a fair doubt is not properly an explanation of reasonable doubt, but the jury could not conclude that a proper instruction as to reasonable doubt is taken back by the meaningless phrase. (Id.)
55. **DECISION OF JURY ACCORDING TO CONSCIENCE.**—It is not improper to instruct the jury that, after weighing the evidence, they must decide according to their consciences. (Id.)
56. **APPEAL — CONFESSION OF ERRORS — IMMEDIATE DECISION — CALENDAR AND ARGUMENT UNNECESSARY.** — A criminal cause in which the attorney general has confessed error, so as necessarily to involve the granting to the defendant appealing of all the relief which he seeks by his appeal, will be decided immediately, and it is unnecessary that the cause should be placed upon the calendar, after the regular time for filing briefs has elapsed, and be orally argued before the court prior to decision thereof. (*People v. Durrant*, 201.)
57. **OBJECT OF RULES OF COURT—EXPEDITION OF CAUSES—REQUEST FOR DELAY.**—The rules of this court for the making up of the calendar, and the filing of briefs, are designed to expedite and not to delay the decision of causes, and have been framed with a view of giving all parties ample opportunity to be heard before their causes are decided against them; and where error is confessed, and it is legally impossible that the defendant can have any other or greater relief than the reversal of the order appealed from, a request that the cause be put upon the calendar and argued prior to decision is manifestly intended only for delay, and will not be granted. (Id.)
58. **HOMICIDE—SENTENCE OF DEATH—AFFIRMANCE OF JUDGMENT—FIXING OF SUBSEQUENT DATE FOR EXECUTION—CONTINUANCE—ABSENCE OF COUNSEL.**—When the sentence of death of a defendant convicted of murder has failed of execution as the result of an appeal, and the judgment of conviction has been affirmed upon appeal, the validity of the judgment is past question in the superior court, and it is not error to refuse a continuance of a hearing appointed for the fixing of a subsequent date for the execution of the sentence, merely because of the absence of a leading counsel in the cause, and it is sufficient to prevent the granting of a continuance that the defendant was represented by other competent counsel. (Id.)
59. **INQUIRY INTO FACTS—LEGAL REASONS AGAINST EXECUTION — EXISTENCE AND EFFECT OF JUDGMENT—JUDICIAL NOTICE—CONSTRUCTION OF CODE.**—Section 1227 of the Penal Code, as amended in 1881, requiring the court to inquire into the facts, upon a defendant being brought before it, for the fixing of a date of execution of a sentence of death which for any reason has not been executed, relates exclusively to an inquiry into facts bearing upon the question whether there are any legal reasons against the execution of the judgment, such as a pardon or commutation of sentence, etc., and does not necessitate an inquiry by testimony or other evidence as to

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the existence of the judgment and its legal effect, of which the court takes judicial notice. (Id.)

60. **BURDEN UPON DEFENDANT.**—The burden is upon the defendant to show, if he can, that any legal cause exists against execution of the judgment. (Id.)
61. **JUDGMENT ORDERING CONFINEMENT OF PRISONER IN STATE'S PRISON—RES ADJUDICATA.**—The legal effect of an explicit direction in the judgment that the defendant should be kept in close confinement at San Quentin by the warden of that prison from the time of his delivery thereat until his execution, is a question involved upon an appeal from the judgment, and, so far as the judgment is concerned, is thereby concluded. (Id.)
62. **SUPERFLUOUS DIRECTION—DUTY OF WARDEN OF STATE'S PRISON.**—It may be true that a direction to keep the defendant in close confinement has no proper place in the judgment, but, if so, it is superfluous and harmless, it being, in the absence of such a direction, the duty of the warden under the statute to keep the prisoner closely confined in the designated prison. (Id.)
63. **IMPRISONMENT PART OF PUNISHMENT FOR MURDER—JUDGMENT NOT VOID.**—Imprisonment in the penitentiary pending execution is part of the punishment for murder provided by law; and a judgment directing such imprisonment is not void on the ground that it imposes a double punishment. (Id.)
64. **REFUSAL OF CERTIFICATE OF PROBABLE CAUSE—APPEAL—RENEWAL OF APPLICATION.**—The remedy for the refusal of a certificate of probable cause for an appeal in a criminal case is not by appeal from the order of refusal, but by renewing the application before a justice or justices of this court. (Id.)
65. **ORDER FIXING DATE OF EXECUTION APPEALABLE—STAY OF EXECUTION—CERTIFICATE OF PROBABLE CAUSE—TIME MUST BE ALLOWED FOR BILL OF EXCEPTIONS.**—An order fixing the date of execution of a sentence of death, after the original time fixed by the sentence has elapsed, is appealable as being an order made after final judgment affecting the substantial rights of the defendant; but the execution of the sentence will not be stayed unless there is a certificate of probable cause, and in order to allow the justices of this court an opportunity properly to determine whether there is probable cause for the appeal, the time fixed by the order must be sufficient to allow the settlement of a bill of exceptions; and where such order fixes so short a time as to deprive the defendant of any opportunity of getting a bill of exceptions or any authenticated record before this court, it is erroneous upon its face, and a certificate of probable cause will be granted for an appeal therefrom, and it will be reversed upon such appeal. (Id.)
66. **INCEST — SUFFICIENCY OF INDICTMENT — CARNAL INTERCOURSE WITH DAUGHTER.** — An indictment for incest, charging that the defendant L. K., at a time and place stated, "did wilfully, unlawfully, knowingly, incestuously, and feloniously, upon the person

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of one C. K., the daughter of said L. K., commit fornication, and have sexual intercourse with and carnally know the said C. K., contrary," etc., sufficiently conforms to all the requirements of the statute, and sufficiently shows that the offense was committed upon an immediate female descendant of the defendant, and not upon an adopted daughter or a stepdaughter or a daughter in law. (*People v. Kaiser*, 456.)

67. **DAUGHTER UNDER AGE OF CONSENT — RAPE — ADDITIONAL INDICTMENT—REVIEW UPON APPEAL.**—The fact that the daughter with whom the incest was committed was under the age of consent, and that the crime committed also included the crime of rape, does not preclude the putting of the defendant on trial for the crime of incest; nor can the fact that an additional indictment was found for the crime of rape be considered upon appeal from a verdict of conviction of the crime of incest, where the record does not disclose that any such indictment was found. (*Id.*)
68. **TESTIMONY OF DAUGHTER — CORROBORATION — CONFLICTING EVIDENCE.**—Where the testimony of the daughter, though slightly corroborated, clearly and explicitly detailed the circumstances of the crime charged against her father, and was sufficient, if believed, to uphold a conviction, the fact that the defendant was called as a witness in his own behalf, and positively denied all the charges made against him, cannot entitle the defendant to a reversal of the judgment, upon the ground that the evidence was insufficient to justify or support the verdict. (*Id.*)
69. **REQUESTED INSTRUCTION AS TO REASONABLE DOUBT—MODIFICATION.** An instruction requested by the defendant, that the facts tending to prove the guilt of the defendant must be established in the minds of the jury beyond a reasonable doubt, "that is, it must entirely satisfy" them of the guilt of the deceased before they could convict, and that if they were not "entirely satisfied," they should acquit him, though it might have been given as requested, is not rendered erroneous or misleading by striking out the word "entirely" therefrom, and giving it as thus modified. (*Id.*)
70. **ENTICING GIRL INTO HOUSE OF PROSTITUTION—PREVIOUS CHASTE CHARACTER — CONFLICT OF EVIDENCE — QUESTION FOR JURY.** — Where the evidence for the prosecution was sufficient to show that the defendant enticed a young unmarried girl, twelve years old, of previous chaste character into a house of prostitution kept by the defendant, for the purpose of prostitution, any conflicting evidence as to her previous chaste character simply raises a question for the jury. (*People v. Elliott*, 593.)
71. **OPINION EVIDENCE OF WITNESS—ORDER STRIKING OUT.**—It is not error to strike out answers of a witness as to what he judged from what he saw. (*Id.*)
72. **ERRONEOUS ADMISSION OF EVIDENCE — ENTICEMENT OF OTHER GIRLS.**—The evidence of other young girls that the defendant had asked each of them to her house to have illicit intercourse with men, is inadmissible; and the admission of such evidence for the

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prosecution is prejudicially erroneous, and requires the reversal of a judgment of conviction. (Id.)

73. INSTRUCTIONS — REPETITION UNNECESSARY. — Instructions given in substance need not be repeated at request of the defendant. (Id.)
74. LARCENY — EVIDENCE — RECENT POSSESSION OF STOLEN COW — EXPLANATION — QUESTION FOR JURY. — The possession by the defendant on the morning after the theft of a stolen cow, which the defendant was accused of stealing, is *prima facie* evidence of guilty possession, and is a circumstance, to be taken in connection with other corroborating circumstances, tending to show guilt of the larceny alleged, unless satisfactorily explained; and where the defendant undertook to explain the possession as having been transferred to him by another person, under circumstances detailed by him, and it could not be said that his explanation was so clearly and evidently true that the jury could not find against it except under the influence of passion or prejudice, but there was evidence from which they might rightly conclude that the explanation was fabricated, the question whether his explanation was true and reasonable or fabricated was a question for the jury to determine, and their verdict of guilty cannot be disturbed on the ground that the inference of guilt was removed by the explanation given by the defendant of the circumstances attending his possession. (People v. Luchetti, 501.)
75. SALE OF COW TO BUTCHER—EVIDENCE OF PREVIOUS PROPOSAL TO SELL—ABSENCE OF REBUTTAL.—It appearing that the stolen cow was sold by the defendant to a butcher on the morning after the theft, the testimony of the butcher that about a week previously the defendant asked the butcher if he did not wish to buy a cow, tended, in some degree, to render improbable the defendant's explanation of his possession of the cow sold, and is not too remote to be inadmissible, and it being in the power of the defendant to rebut such inference if not correct, the failure of the defendant to offer evidence to show that he had in his possession another cow which he was proposing to sell the week previous added to the improbability of his testimony. (Id.)
76. INSTRUCTIONS — POSSESSION OF STOLEN PROPERTY—"GUILTY CIRCUMSTANCE."—The use of the words "guilty circumstance," instead of the words "a circumstance tending to show guilt," in an instruction as to the effect of the unexplained possession of stolen property soon after the taking, could not be misleading to the jury, where other instructions on that subject were such as must have corrected any erroneous impressions made upon the minds of the jurors. (Id.)
77. MODIFICATION OF INSTRUCTION — DISCREDITING OF FALSE WITNESS. Where the defendant requested an instruction substantially covering the provision of section 2061, subdivision 3, of the Code of Civil Procedure, that "a witness false in one part of his testimony is to be distrusted in others," a modification of the instruction by the word "wilfully" before the word "false" did not render the instruction erroneous, nor change the effect of the instruction as offered. (Id.)

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78. **INSTRUCTION TAKING CASE FROM JURY — IMPROPER REQUEST.** — Where there was evidence sufficient to sustain a verdict of guilty of larceny, an instruction requested that there was no evidence that the defendant participated in the actual stealing of the cow, and that the evidence only showed that defendant sold property alleged to have been stolen, and that defendant could not be convicted upon that evidence, would have taken the case from the jury, and was properly refused. (Id.)
79. **RAPE — GIRL UNDER AGE OF CONSENT — INSTRUCTION — IMPROPER REQUEST — ABSENCE OF OUTCRY AND IMMEDIATE DISCLOSURE.**—Upon the trial of a defendant charged with the crime of rape, committed upon a girl under fourteen years of age, it is proper to refuse to instruct the jury, upon request of the defendant, that the facts that the prosecutrix made no outcry and no immediate disclosure, and that there was but little indication of violence to her person, "are proper to be taken into consideration by the jury, as throwing doubt upon the assumption that the act was committed at all," the consent of the girl being immaterial, as affecting the guilt of the defendant, and the undisputed facts being such as to show that there was no probative force in the alleged facts, and the instruction being a clear invasion of the province of the jury, and involving an assumption that certain controverted facts had been established by the evidence. (People v. Lee, 84.)
80. **CONSUMMATION OF CRIME—CONFLICTING EVIDENCE—EXPERT TESTIMONY.**—Where the testimony of the prosecutrix and of the defendant is conflicting as to whether the crime of rape was consummated or only attempted, and the circumstances shown by the testimony of the medical experts tended to show that there was not a complete sexual act, but they are all so far consistent with the evidence of the prosecutrix that enough may have been done to constitute the crime of rape, a verdict of conviction of that crime will not be disturbed upon appeal for insufficiency of the evidence. (Id.)
81. **TRAIN WRECKING — CONSTITUTIONALITY OF STATUTE — TITLE OF ACT — CONSTRUCTION — BOARDING PASSENGER TRAIN WITH INTENT TO ROB THE SAME.** — The act of the legislature commonly known as the "train wrecking act," which is designated by title as an act "relating to train wrecking," does not violate the provision of the constitution which declares that every act of the legislature shall embrace but one subject, which shall be expressed in its title, because in the body of the act a person is declared guilty who unlawfully boards a train with intent to rob the same, such provision not being intended to punish train robbery as such, but to prevent train wrecking, and in that respect stands in relation to the title as other provisions of the act. (People v. Lovren, 88.)
82. **"ROBBING PASSENGER TRAIN"—ACT NOT TO BE CONSTRUED AS MEANINGLESS.**—The phrase "robbing a passenger train" is not to be construed as meaningless or absurd; and though the act is crude, it is not to be nullified by the courts, it being the purpose of the act to

CRIMINAL LAW (Continued).

pervent train wrecking. A person is guilty of the offense of "boarding a passenger train with intent to rob the same" when he unlawfully boards a passenger train with the intention to take by force and intimidation the control and management thereof from the employees, and thereupon to commit larceny or robbery thereon. (Id.)

83. **EVIDENCE — CONSPIRACY — DECLARATIONS OF CONSPIRATORS.**—Where the evidence is sufficient to establish a conspiracy between the defendant and other persons to board a passenger train with intent to commit robbery, all statements, acts, and declarations made by the other conspirators, pending the commission of the crime, are competent evidence against the defendant. (Id.)
84. **CONSPIRACY TO ROB NORTHBOUND TRAIN—CHANGE OF PURPOSE TO SOUTHBOUND TRAIN—DECLARATION OF CO-CONSPIRATOR.**—Where the conspiracy disclosed by the evidence originally contemplated the robbery of a northbound train, and the southbound train upon the same railroad was the one in fact boarded, it seems that such change in the plans of the conspirators at the last moment as to the particular train to be boarded and robbed, even if made without the knowledge of such change coming to the defendant, or his personal presence at the commission of the offense, would not demand his acquittal; but the declaration of a co-conspirator that defendant said, at a time when it was the intention to attack the southbound train, that there would be more money upon the southbound than upon the northbound train, is competent evidence to prove that defendant was an accessory to the offense committed. (Id.)
85. **EXPERT EVIDENCE — TEXTURE OF CLOTH.**—The question whether or not two pieces of cloth were of the same texture and quality is a proper subject for the expert testimony of persons experienced in handling such cloths. (Id.)
86. **WILLFUL AND UNLAWFUL USE OF No. 8 SHOTGUN—INSUFFICIENT COMPLAINT—PURPOSE OF USE—STATUTORY CONSTRUCTION — JURISDICTION — HABEAS CORPUS.**—Section 27 of the Penal Code, as amended March 9, 1897, making the willful and unlawful use of a shotgun of a larger caliber than that commonly known as a No. 10 gauge a misdemeanor is not to be construed as making it a misdemeanor to use a larger shotgun in any possible way, or for any possible purpose, but, taking the whole context of the act, it was the evident intention of the legislature to prohibit the use of guns of larger caliber for the purpose of killing game or other animals, and, in a prosecution under such a statute, it is not sufficient to follow its literal terms in charging the offense, but the particular kind of use which the legislature intended to prohibit must be alleged; and a complaint charging the wilful and unlawful use of a No. 8 shotgun merely in the language of the statute, is insufficient to show a complete offense, or to give a justice of the peace jurisdiction, and a defendant convicted under such complaint, must be discharged on *habeas corpus*. (Ex parte Peterson, 578.)

CRUELTY. See Divorce, 1-7.

DAMAGES.

1. **PURCHASE OF LAND AND WATER RIGHT—IMPROPER TRANSFER AND CANCELLATION OF WATER RIGHT BY VENDOR—ACTION FOR DAMAGES—INSTRUCTIONS AS TO PUNITIVE DAMAGES.**—In an action for damages for the improper transfer and cancellation of a water right by the defendant, after plaintiff had purchased from defendant a tract of land with such water right appurtenant thereto, and had received a deed therefor, but prior to its recordation, where the complaint avers that the acts of the defendant were done "wilfully, without any right whatever, from wanton motives, and without plaintiff's consent and knowledge, and under circumstances of great hardship and oppression to plaintiff," and the answer averred that they occurred inadvertently and without any intent to oppress plaintiff or maliciously injure him, and the evidence was conflicting as to the actual damage suffered, the question whether or not plaintiff was entitled to punitive damages is material; and where the court instructed the jury that "in any action for the breach of an obligation not arising upon contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant," the defendant is also entitled to have the jury fairly instructed as to the general principle of law governing the matter of punitive damages, upon his theory of the case, and though not entitled to an instruction that there was no evidence which would warrant any punitive damages, nor to any instructions containing too narrow a statement of the principle upon which punitive damages may be given, he is entitled to have the jury instructed that "a tort committed by mistake, in the assertion of a supposed right, or without any actual wrong or intention, and without any such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of punitive damages," and a refusal to give such instruction is ground for reversal. (*Lyles v. Perrin*, 264.)

See Claim and Delivery, 5; Libel, 6, 10; Parent and Child, 1; Sale, 6.

DEBTOR AND CREDITOR.

1. **TRUST—SALE OF LANDS FOR INDEBTEDNESS TO BANK—JOINT DEBTORS—SEPARATE SETTLEMENTS—RELEASE OF ONE DEBTOR EXCEPT AS TO LANDS—SETTLEMENT WITH CODEBTOR—SURRENDER OF NOTES—ACTION BY ADMINISTRATOR FOR ACCOUNTING AS TO LANDS.**—Where each of two debtors gave his notes to a bank with the other as indorser, and transferred lands and other securities to the bank to secure his indebtedness upon an express trust to sell the lands to pay the indebtedness, and the bank, for a valuable consideration, surrendered his personal securities to one of the debtors, and released him from liability upon the notes except as to the lands transferred by him to the bank in trust, the settlement in no way touching upon or affecting the rights and liabilities of his codebtor,

DEBTOR AND CREDITOR (Continued).

with whom a separate settlement was subsequently had, involving an absolute conveyance of his lands to the bank, and a release of his indebtedness, and surrender of all the notes to him, such settlement in no way touching upon or referring to the other debtor with whom the first settlement was made, the burden of indebtedness remaining upon the lands under the first settlement was not removed or discharged or in any way affected by the second settlement with the codebtor, and such lands, being still held upon the original trust, formed no part of the estate of the deceased trustor, and upon subsequent sale thereof by the bank and application of the proceeds in part payment of the original indebtedness of the deceased trustor to the bank, his administrator cannot maintain an action against the bank for an accounting upon the theory that the entire indebtedness of both debtors was discharged by the surrender of the notes, and that the lands of the deceased debtor were thereby released from the trust and reverted to the estate. (*Friedlander v. Bank of California*, 93.)

2. **CONFLICTING EVIDENCE AS TO NATURE OF SECOND SETTLEMENT—ADMISSION OF BANK—CLOSING OF NOTE ACCOUNT—FINDINGS—SUFFICIENCY OF EVIDENCE.**—Where there is evidence of circumstances tending to show that the second separate settlement was simply a release of the liability of the debtor with whom it was made, and that the other debtor who had been before released except as to his lands was a stranger to the second transaction, and that it had nothing to do with the charge of his indebtedness upon his lands, or any release thereof, the fact that the bank, in an answer filed in another action, admitted that the entire indebtedness of both debtors was satisfied and discharged by the deed given at the second settlement, and the further fact that all the notes were given up at the time of that settlement, and the note account upon the books was then balanced and closed, cannot be held conclusive that the liability of the other debtor charged upon his lands was then discharged, but served only to create a conflict of evidence, the weight of which was matter for the trial court, and its findings against such discharge will not be disturbed for want of evidence to sustain them. (*Id.*)

See *Estates of Deceased Persons*, 16-18; *Guaranty*.

DEDICATION. See *Home for Inebriates*.

DEED. See *Boundaries*; *Mortgage*, 2, 8, 10, 18; *Taxation*, 6.

DEMAND. See *Attachment*, 2-6.

DIVORCE.

1. **EXTREME CRUELTY — GRIEVOUS MENTAL SUFFERING — ANNOYING CONDUCT—VILE EPITHETS—IMPAIRMENT OF HEALTH—PLEADING—FINDINGS—SUFFICIENCY OF EVIDENCE.**—In an action for divorce upon the ground of extreme cruelty of the defendant in causing grievous mental suffering to the plaintiff, by an annoying course of

DIVORCE (Continued).

conduct, and by the use of vile and indecent epithets, and charges of unchastity, it is not necessary to allege or show that impairment of health resulted from the conduct of the defendant toward the plaintiff; and where there was evidence tending to sustain the allegations of the complaint as to the acts and probative facts of cruelty causing the grievous mental suffering alleged, and the court found that they were committed by the defendant, and that defendant, by his conduct, wilfully inflicted upon plaintiff grievous mental pain and suffering, "thereby greatly impairing her health," the finding as to the impairment of plaintiff's health is unnecessary, and it is immaterial whether that part of the finding was or was not justified by the evidence. (Smith v. Smith, 183.)

2. **CONDONATION OF CRUELTY — QUESTION OF FACT — FINDING.**—Whether a cruel and offensive course of conduct has been condoned is a question of fact; and a finding that the acts of cruelty committed by the defendant have never been condoned by the plaintiff is a finding of fact, and not of a conclusion of law; and it is unnecessary and improper that the finding should set forth any acts or declarations bearing as evidence upon the fact of condonation. (Id.)
3. **EXPRESS AGREEMENT TO CONDONE REQUIRED—MERE COHABITATION AND RESTORATION TO MARITAL RIGHTS INSUFFICIENT.**—Under section 118 of the Civil Code, a course of offensive or cruel conduct constituting a cause of divorce, cannot be condoned by mere cohabitation, or passive endurance, or conjugal kindness, unless accompanied by an express agreement to condone; and an answer alleging that the plaintiff freely cohabited with the defendant, and restored him to his marital rights, without alleging that these acts were accompanied by an express agreement to condone, does not raise an issue of condonation. (Id.)
4. **CONCLUSIONS OF LAW.**—It is not necessary to insert in the conclusions of law in an action for divorce on the ground of extreme cruelty that defendant has been guilty of extreme cruelty toward plaintiff, or that plaintiff has not been guilty of extreme cruelty toward the defendant, or that plaintiff has never condoned the acts of extreme cruelty on the part of the defendant; but it is sufficient to state as a general conclusion of law that plaintiff is entitled to a decree dissolving the bonds of matrimony heretofore existing between the plaintiff and the defendant, and decreeing plaintiff and defendant each to be forever absolutely released from the bonds of matrimony and all the obligations arising therefrom, with such other specific conclusions as relate to the custody of the children, the division of the community property, etc. (Id.)
5. **INSUFFICIENT RECRIMINATION—OMISSION TO FIND IMMATERIAL.**—When the facts averred by way of recrimination in the answer of the defendant are insufficient to authorize or justify a decree of divorce in his favor, if he had sued thereupon, and the evidence fails to disclose such facts as would justify the conclusion that they constituted extreme cruelty on the part of the plaintiff, as defined

DIVORCE (Continued).

by the Civil Code, the omission to find upon the recriminatory matter in the answer is immaterial, and is not ground for reversal. (Id.)

6. **CORROBORATION OF PLAINTIFF'S TESTIMONY.**—The principal object of the rule requiring corroboration of the evidence of the plaintiff is to prevent collusion; and where it is clear that there is no collusion and the defendant's testimony, though conflicting with that of the plaintiff in many of its details, in the more important matters was corroborative of the plaintiff's testimony, which was also corroborated in certain respects by other testimony, the corroboration is sufficient. (Id.)
7. **MOTION FOR NEW TRIAL—NEWLY DISCOVERED EVIDENCE—LETTER FROM PLAINTIFF—CONDONATION—INSUFFICIENT SHOWING.**—Alleged newly discovered evidence of a letter from the plaintiff to the defendant, claimed to be evidence of condonation, a copy of which was proved at the trial to be in the possession of plaintiff, and of which defendant might then have requested the production, and, if not produced, might have applied for postponement of the trial for a reasonable time to enable him to find the original, is not ground for a new trial, and especially not where it appears that the letter, at most, was only evidence of conjugal kindness, and did not tend to show an express agreement to condone the offensive course of conduct of the defendant. (Id.)
8. **ALIMONY—INABILITY OF DEFENDANT—NEGLECT TO SEEK EMPLOYMENT UNDER ORDER OF COURT—CONTEMPT — JURISDICTION — HABEAS CORPUS.**—The court in which a decree of divorce is entered, including an order that the defendant shall pay a permanent alimony to the plaintiff in specified installments, has no jurisdiction to compel the defendant, where he has no money or other means of payment, and has made no fraudulent disposition of property, to seek employment in order to earn money to pay the alimony decreed, nor to punish him for contempt for failing to do so; and where he is imprisoned for such alleged contempt, he will be discharged upon *habeas corpus*. (Ex parte Todd, 57.)

See Appeal, 20; Parent and Child.

ECCLESIASTICAL LAW. See Church.**ELECTION.**

1. **ELECTION CONTEST—POWER OF ADJOURNMENT OF SPECIAL SESSION—PRIOR ENGAGEMENT OF COURT—JURISDICTION.**—Section 1120 of the Code of Civil Procedure is not to be construed as limiting the power of adjournment by the court of a special session ordered for the trial of an election contest, merely from day to day or upon good cause shown by either party, not exceeding twenty days; but the court has power of its own motion to adjourn the session for several days, on account of a prior engagement of the court rendering such adjournment necessary, and the court does not lose jurisdiction to try the contest on account of such adjournment. (Falltrick v. Sullivan, 613.)

ELECTION (Continued).

2. **ILLEGAL VOTES—INSUFFICIENT REGISTRATION.**—Votes cast at an election for school trustees of persons whose names had not been enrolled upon the great register of the county fifteen days prior to the election are illegal, and must be rejected in determining an election contest. (Id.)
3. **OATH AS TO QUALIFICATION—CONSTRUCTION OF CODE.**—The fact that section 1600 of the Political Code, which provides for the reception of a vote upon the voter taking the oath prescribed by that section, was not amended so as to conform to the amendment of 1893 to section 1083, requiring registration of the voter fifteen days prior to an election, does not determine the legality of the vote cast by the one who has taken the oath. (Id.)
4. **CANCELLATION OF GREAT REGISTER—JURISDICTION OF SUPERVISORS.** The great register of a county must remain for all purposes required by law before the completion of a new register; and the board of supervisors have no authority to declare the old register canceled before the registration of the new register is complete. (Id.)

See Municipal Corporations, 13-15.

ELEVATOR. See Negligence, 1, 2.

EMINENT DOMAIN.

CONDEMNATION OF LAND FOR PUBLIC STREET—POWER OF MUNICIPAL CORPORATION — STATUTORY CONSTRUCTION. — The provisions of the act of March 6, 1889, relative to the laying out, opening, extending, widening and straightening of public streets in municipalities are not exclusive, and were not designed to prohibit a municipality from maintaining proceedings to condemn land for a public street under the provisions of part III, title VII, of the Code of Civil Procedure; and a municipal corporation has power to institute such proceedings under the code, where it has funds in the treasury available for the proposed condemnation and opening of the street, without resort first had to the method provided in the act of March 6, 1889. (*Los Angeles v. Leavis*, 164.)

EQUITY. See Injunction; Insolvency, 1; Quieting Title; Specific Performance.

ESTATES OF DECEASED PERSONS.

1. **PRESENTATION OF CLAIMS—CLAIM OF ANOTHER DECEDENT — STATUTE OF LIMITATIONS — EXCEPTION — CONSTRUCTION OF CODE.**—Section 149 of the Code of Civil Procedure, declaring that all the claims arising upon contract, whether the same be due or contingent, must be presented within the time limited in the notice to creditors, and any claim not so presented is barred forever, is a statute of limitations having no exception from its operation saving the claim of a claimant who had no notice by reason of being out of the state; and a court is not authorized to make any other exception to relieve from hardship, or to aid apparent

ESTATES OF DECEASED PERSONS (Continued).

equities; and a claim arising upon contract presented by the administrator of a deceased claimant, after the time for presentation of claims has elapsed, is properly rejected, and an action thereupon is barred by sections 1493 and 1500 of the Code of Civil Procedure. (*Morrow v. Barker*, 65.)

2. **RIGHT OF ADMINISTRATOR TO BRING AND MAINTAIN ACTION—CONSTRUCTION OF CODE.**—Section 353 of the Code of Civil Procedure, which provides that in case of the death of a deceased person entitled to bring an action before the expiration of the time limited for the commencement thereof, an action may be commenced by his representative after that time, and within six months from his death, does not apply to an action upon a claim against the estate of another deceased person; and section 1500 of the same code, which declares that no holder of any claim shall maintain any action thereon, unless the claim shall first have been presented, is to be construed as precluding the right to bring an action until such presentation, the first essential of the right to maintain or prosecute an action being the right to bring or commence it. (*Id.*)
3. **TRUST UNDER WILL—SETTLEMENT OF ACCOUNT OF TRUSTEES—ERROR IN DATE OF COMMENCEMENT OF ANNUITY—AMENDMENT.**—Where an order settling an annual account of trustees under the will of a deceased person erroneously purported to fix the date of the commencement of an annuity upon which payments were made by the trustees at a time subsequent to the death of the testator, and contrary to the previous express decision of the court that the annuity was to date from the testator's decease, made in an action brought by the trustees to determine the date from which the annuity began to run, it is proper for the court to grant a motion, based upon all the papers and proceedings in both causes, for an amendatory order, such that the sums paid by the trustees should be merely "allowed on account of said annuity." (*Estate of Pratt*, 153.)
4. **TRUST UNDER WILL—SETTLEMENT OF ACCOUNT OF TRUSTEES—ITEMS ALLOWED IN PREVIOUS ACCOUNT.**—When the annual accounts of trustees acting under the will of a deceased person have been settled and approved, they are only subject to direct attack by motion to open the settlement, or other like remedy in the superior court, or on appeal, and items allowed in a previous annual account cannot be examined into upon the settlement of a succeeding annual account. (*Estate of Pratt*, 156.)
5. **ITEM FOR SERVICES OF BOOKKEEPER—RELATIVE OF TRUSTEE—DISCRETION.**—The allowance of an item for the services of a bookkeeper for the trustees will not be deemed an abuse of discretion, merely upon a showing that the bookkeeper was a relative and employee of one of the trustees, where it does not appear that such trustee had any interest in his earnings, and there is no other or fuller showing against the item. (*Id.*)
6. **VALIDITY OF TRUST UNDER WILL—TERM OF YEARS—SUSPENSION OF POWER OF ALIENATION.**—A trust provided for in a will which

ESTATES OF DECEASED PERSONS (Continued).

suspends the absolute power of alienation for a fixed term of years, not depending upon the duration of lives in being, must be held invalid upon a direct appeal from a decree distributing the testator's estate to the trustees named in the will. (*Crew v. Pratt*, 139.)

7. DECREE OF DISTRIBUTION TO TRUSTEES—PROCEEDING IN REM—FAILURE TO APPEAL—CONCLUSIVE ADJUDICATION OF VALIDITY OF TRUST—ACTION BY TRUSTEES.—The distribution of the estate of a deceased person is a proceeding *in rem*, and the action of the court in making the distribution binds the whole world, subject only to be reversed, set aside, or modified upon appeal; and a decree distributing the estate to trustees named in the will of the decedent, which has become final by failure to appeal therefrom, though erroneous, is a conclusive adjudication of the validity of the trust, and cannot be collaterally assailed by the heirs, legatees, or devisees, or their representatives, in an action brought by the trustees against them to have it adjudged that plaintiffs are the owners as trustees of the estate devised in trust to them, and that defendants have no estate in the premises except as beneficiaries of the trust. (*Id.*)
8. JURISDICTION OF SUBJECT MATTER — POWER OF ERRONEOUS DECISION—COLLATERAL ATTACK—SELECTION OF TRUSTEES AS DISTRIBUTEES—POWER TO DETERMINE VALIDITY OF TRUST.—Jurisdiction of the subject matter includes power to pronounce the resulting judgment over which the jurisdiction extends, and to decide wrong, as well as to decide right, so far as the validity of its judgment is concerned, as against a collateral attack; and a court having jurisdiction over the subject matter of the distribution of the estate of a deceased person, and to determine to whom, and in what proportion it shall be distributed, has power erroneously to select the trustees named in the will as distributees of the trust, and incidentally to determine the validity of the trust, and the lawfulness of the right of the trustees to take under the will, and its determination, though erroneous, can only be corrected upon appeal, and is not open to collateral attack. (*Id.*)
9. PROBATE OF WILL—PROOF OF PUBLICATION IN DAILY PAPER. — A notice of the time fixed for the probate of a will is sufficiently proved to have been published in a daily paper for the requisite period by an affidavit showing that it was published in a paper purporting by its name to be a daily paper, daily for eleven days. (*Id.*)
10. SETTLEMENT OF FINAL ACCOUNT AND DISTRIBUTION—PROOF OF POSTING NOTICE—AFFIDAVIT MADE UPON DAY OF POSTING—PRESUMPTION.—It is no objection to the jurisdiction of the court to settle the final account of executors, and to order distribution of the estate of a decedent, that the affidavit of the posting of the notice of the hearing was made on the day of the posting; but the presumption is that the notice remained posted during the statutory period. (*Id.*)
11. RECITALS IN DECREE—DUE SERVICE OF NOTICE—COLLATERAL ATTACK.—Where a decree recites due service of notice by publication or by posting, such recital is sufficient to prove such service, as against a collateral attack. (*Id.*)

ESTATES OF DECEASED PERSONS (Continued).

12. **APPEARANCE AT HEARING—WAIVER OF OBJECTION TO NOTICE.**—The appearance or representation of all the heirs at the hearing on final distribution, is a sufficient answer to any objection to the sufficiency of the notice of the hearing. (Id.)
13. **TRUST UNDER WILL—DECREE OF DISTRIBUTION TO TRUSTEES—DETERMINATION OF VALIDITY OF TRUST — RES ADJUDICATA — CREDITOR'S BILL.** — Where the estate of a deceased person is distributed to the trustees appointed under the will, the decree of distribution is an adjudication of the validity of the trust, and of the title of the trustees to take under the will; and where such decree has become final by failure to appeal therefrom, the title of the trustees and the validity of the trust cannot be assailed upon a creditor's bill filed to subject to execution the property of a beneficiary of the trust, to whom the trustees were to pay a portion of the income of the estate during his life, as it should be received by them. (*Goldtree v. Allison*, 344.)
14. **DISTRIBUTION—SEPARATE PROPERTY OF HUSBAND—PRESUMPTION FROM PURCHASE AFTER MARRIAGE—REBUTTING PROOF.** — Property acquired by the husband before marriage is properly distributed as his separate estate; and the presumption that property purchased after marriage is community property is rebutted and overcome by proof that the property acquired after marriage was acquired by the ordinary use of his separate property, and that lands which appear to have been the nucleus of subsequent holdings was settled upon, possessed, and claimed by him long before his marriage, although not consummated by patent from the sources of paramount title until subsequent to the marriage. (*Estate of Boody*, 402.)
15. **TIME FOR NOTICE TO CREDITORS—ALLEGED FRAUDULENT UNDERVALUATION — EQUITABLE ACTION BY CREDITOR AFTER DISTRIBUTION — LACHES — MEANS OF KNOWLEDGE.** — A complaint in an equitable action brought by a creditor of the estate of a deceased person, after the final settlement and distribution of the estate, to annul all proceedings in the matter of the estate, subsequent to the return of the inventory, and to compel the administratrix to allow the plaintiff's claim, upon the ground that the estate had been fraudulently undervalued, and that the notice to creditors should have been published for ten months, instead of four months, and alleging that plaintiff had no actual or constructive notice of such undervaluation, or of the proceedings for the settlement of said estate, but not alleging ignorance of the death of the decedent, nor of the appointment of the administratrix, nor of the inventory filed, does not state a cause of action; but the plaintiff, notwithstanding the allegation to the contrary, is chargeable with the constructive notice of the proceedings, and, having had sufficient means of knowledge of the alleged undervaluation to be put upon inquiry, is chargeable with inexcusable laches, in not obtaining relief, if a fraud was being perpetrated, before the final settlement of the estate. (*Lyman v. Kerns*, 447.)
16. **ACTION BY EXECUTOR — DEPOSIT IN BANK BY DECEDENT — NOTE OF DEPOSITOR ACCRUING AFTER DEATH — COMPENSATION**

ESTATES OF DECEASED PERSONS (Continued).

OF CROSS-DEMANDS — COUNTERCLAIM. — In an action by an executor to recover from a bank the amount of a deposit made by the decedent, the bank has the right to claim as against the executor a compensation of cross-demands by credit of the amount of the deposit upon a note for a larger sum made by the decedent to the bank in his lifetime, and which accrued subsequently to his death and prior to the commencement of the action, the demands being deemed compensated so far as they equal each other, under section 440 of the Code of Civil Procedure; and has the right also to plead the note as a counterclaim to the action by the executor to recover the amount of the deposit, under sections 437 and 438 of the same code, the note being a matured claim upon contract existing at the commencement of the action. (*Ainsworth v. Bank, of California*, 470.)

17. TITLE OF EXECUTOR OR ADMINISTRATOR—RELATION—SUBJECTION TO COUNTERCLAIM—BALANCE OF MUTUAL DEMANDS—PURPOSE OF LAW. The title of an executor or administrator to the assets of the estate takes effect by relation from the death of the decedent, but it passes subject to any right of setoff or counterclaim existing in favor of a creditor of the estate; and the purpose of the law in adjusting mutual demands in favor of the estate and of a claimant against it, is to ascertain the balance existing, and to give both to the claimant and to the estate the benefit of all just setoffs, whether the estate be solvent or insolvent; and claims not liquidated and debts absolutely due, though payable in future, are to be included in the adjustment, and the balance found upon such adjustment is the only debt remaining. (*Id.*)
18. CONSTRUCTION OF CODE—EFFECT OF DEATH BEFORE MATURITY OF DEMAND—OFFSET AGAINST EXECUTOR.—The statute of setoff relates to the situation of the parties at the commencement of the action; and the death of one of the parties to the demand, though such death occur before the maturity of the demand, will not change the relative rights of the parties in pleading a counterclaim, or in compensating cross-demands so far as they equal each other, provided the setoff be due when the action is commenced by the executor. (*Id.*)
19. SUBSTITUTION OF ATTORNEYS — ALLOWANCE OF COUNSEL FEE— JURISDICTION — NOTICE OF HEARING — APPEARANCE OF PARTIES — RECITAL IN ORDER — OBJECTION UPON APPEAL. — After the substitution of attorneys for an executor has been ordered, the court has jurisdiction to allow a counsel fee to the retiring attorney in advance of the final settlement of the estate; and where the executor appealing from the order of allowance, and all persons interested in the estate appeared and took part in the proceedings upon the application for such allowance, and the order of allowance so recited, and there is nothing in the record upon appeal of the executor to contradict such recital, it must be taken as true, and a general claim of want of jurisdiction to make the order cannot be supported upon such appeal, for the first time, upon

ESTATES OF DECEASED PERSONS (Continued).

the ground of the lack of service of formal notice of the hearing upon the parties interested. (Estate of Kasson, 489.)

20. **EFFECT OF ALLOWANCE OF COUNSEL FEES—LIABILITY OF ESTATE—CONTRACT WITH EXECUTOR—PERSONAL LIABILITY—RELEASE—PAYMENT—ACQUITTAL OF EXECUTOR.**—The determination of the court in allowing counsel fees to an attorney is not a determination of the contract made by the executor and attorney as to the fee to be paid, but relates simply to the amount of fee the estate should be held to pay, and, if any greater amount is agreed upon, it is purely a personal matter between the contracting parties; and where the amount allowed is not less than the sum agreed upon, and by the contract of the parties the fee was to be fixed by the court according to the value of the services rendered, such agreement is in effect a perfect release of the executor from any personal liability for an attorney's fee; and in such case an allowance of a fee to the attorney by the court, and its payment by the executor to the attorney after such allowance, will acquit the executor of liability to the estate as to that matter in the future settlement of his accounts. (Id.)
21. **ORDER OF SALE—SUFFICIENCY OF PETITION — COLLATERAL ATTACK UPON ORDER.**—An order of sale of real property belonging to the estate of a deceased person is an appealable order, and cannot be collaterally attacked for any objection to the petition upon which the order was made, which might have been corrected upon a direct appeal therefrom, unless such petition is so defective that the court did not acquire jurisdiction to make the order; and an objection made by the purchaser at the sale to an order confirming it, upon the ground that the petition for the sale did not properly state the condition of the property ordered sold, is a collateral attack upon the order of sale. (Estate of Devincenzi, 498.)
22. **INDEFINITE STATEMENT AS TO CONDITION OF PROPERTY—JURISDICTION—COLLATERAL ATTACK BY PURCHASER.**—Where the petition for the order of sale set forth a full description of the property, showing that it was improved, and stated that its condition was "fair," and that its value was four thousand dollars, such indefinite statement of its condition, though it might have been objected to at the hearing on the ground of uncertainty, was sufficient to give the court jurisdiction to determine the sufficiency of the petition, and to receive evidence as to the condition of the property, and to make a valid order of sale, which cannot be collaterally attacked by the purchaser at the sale for insufficiency of the petition. (Id.)
23. **DEGREE OF PARTICULARITY REQUIRED—SALE OF SINGLE PARCEL.**—The sufficiency of the particulars of the condition of the property which should be set forth in a petition for an order of sale of real estate of a decedent must be determined by the circumstances of each case: and where it is shown to be necessary to make a sale of property for the purpose of paying claims, and the estate consisted of a single piece of real property, a court would require less particularity in the petition than where the estate comprises several pieces of property, and it is required to direct the sale of only one. (Id.)

ESTATES OF DECEASED PERSONS (Continued). •

24. **POWER OF EXECUTOR OR ADMINISTRATOR TO BIND ESTATE—PERSONAL LIABILITY — REIMBURSEMENT.** — The estate of a deceased person can neither be held liable in damages for a tort committed nor for a breach of contract entered into by an executor or administrator; nor can an executor or administrator create a debt against the estate, other than for funeral expenses and expenses of administration, or borrow money upon the credit of the estate, or create any obligation which will give a right of action against the estate, except when expressly authorized by the will or by statute, and, even when the executor is authorized to carry on business, the creditor must look to the executor personally, the right to hold the estate in such case being in the representative only; and on contracts made by executors or administrators for necessary matters relating to the estate, they are personally liable, and must see to it that they are reimbursed out of the assets. (*Sterrett v. Barker*, 492.)
25. **INSUFFICIENT COMPLAINT AGAINST ESTATE—SALE OF SHEEP BY EXECUTRIX—LEASE TO EXECUTRIX—REFUSAL TO DELIVERY—DAMAGE—COUNT FOR MONEY PAID.**—A complaint against an administrator of the estate of a testator, with the will annexed, setting forth that the property of the estate was given to the executrix in trust with power to sell, without obtaining an order of court, and that she, for a consideration paid by plaintiff, sold and agreed to deliver to plaintiff a band of sheep in her possession as executrix, and that plaintiff leased the same to the executrix, to be surrendered when called for, together with one-half of the increase and one-half of the wool produced, and alleging that the executrix resigned, and that defendant was appointed administrator with the will annexed, and took possession of the sheep and refused to deliver them on demand, and stating the value of the sheep, lambs, and wool, and the number of lambs, and that plaintiff's damage by the refusal of defendant to deliver the sheep and carry out the agreement concerning the sale and delivery of the sheep, and the increase thereof, and the wool therefrom, was the sum of two thousand and fifty dollars, states no cause of action against the estate, whether it be construed as suing for a conversion by the defendant, or for damages for breach of the contract entered into by the executrix; and a count for money received by the executrix, and paid, laid out, and expended by plaintiff for the benefit of the estate while she was executrix shows no liability on the part of the estate to the plaintiff. (*Id.*)
26. **ACTION AGAINST ADMINISTRATOR—EXCLUSION OF PERSONAL LIABILITY—IMPROPER AMENDMENT.**—The only way in which an action can be brought against an estate is to sue the administrator or executor in his representative capacity, and the rule is, that he cannot be sued in the same action upon his individual or personal liability, and in his representative capacity; nor can a complaint brought against him in his representative capacity be amended so as to constitute an action against the executor or administrator individually, as such amendment would be an entire change of the party defendant, and a different suit. (*Id.*)

ESTATES OF DECEASED PERSONS (Continued).

27. **TRUST UNDER WILL — DECREE OF DISTRIBUTION TO TRUSTEES — CONCLUSIVENESS OF DECREE UPON CONSTRUCTION OF WILL—POWER OF TRUSTEES.**—A decree of distribution to trustees under the will of a deceased person, unappealed from is final and conclusive as to the terms of the trust defined therein, and as to the powers and duties of the trustees in regard to the trust property distributed to them, which are to be measured by the terms of the decree, and not by the terms of the will, which is superseded by the decree, and cannot be resorted to as evidence to impeach the decree, or to establish powers of the trustees not conferred by the decree; and where such decree distributed certain real estate and certain mortgage securities to the trustees in lieu of a large money legacy required by the will to be managed by the trustees for the benefit of the minor children of the testator, and the decree declared that the property so distributed to them was "in trust that the said trustees shall manage the said property and pay over and deliver one-half of said property so distributed to them," to each of the children upon their respectively attaining the age of majority, the trustees, though originally empowered by the will as executors to sell and convey and dispose of all the property owned by the testator without any order of court, have no power to sell or dispose of any of the property distributed to them by the decree in trust, except as directed and confirmed by order of a court of competent jurisdiction. (*Goad v. Montgomery*, 552.)
28. **POWER OF COURT IN DISTRIBUTION OF ESTATE—CONSTRUCTION OF WILL IN DECREE.**—A court having jurisdiction to distribute the estate of a deceased person has power to determine what distribution shall be made under its decree to trustees named in the will, and to construe the will of the testator, and determine his intention in creating a trust thereunder, and to distribute the estate to the trustees in accordance with its own views of his intention, and of the powers and duties of the trustees appointed thereunder; and, where no appeal is taken from its decree by the trustees, it becomes conclusive upon them, and they can no longer contend for a different construction from that which is imported by the terms of the decree, which must be regarded as a construction by the court of the testator's intention, and is to be treated as if he had created the trust in the terms of the decree. (*Id.*)
29. **COINCIDENCE OF DECREES—PRIOR DECREE AUTHORIZING SUBSTITUTION OF PROPERTY FOR LEGACY—REFERENCE IN DECREE OF DISTRIBUTION.**—A reference made in the decree of distribution to a prior decree made in an action brought by the trustees to have it determined that it was for the best interest of the estate to have the property distributed in kind among the parties interested, instead of converting it into money, by which decree certain designated property was substituted in lieu and in full satisfaction of a pecuniary legacy given to the minor children, is not to be considered as controlling the decree of distribution, though made in

ESTATES OF DECEASED PERSONS (Continued).

accordance therewith, and the court, in distributing the property, is to be deemed as acting in accordance with its own views. (Id.)

30. **PAYMENT OF CLAIMS WITHOUT ORDER OF COURT — INSOLVENCY OF ESTATE — SETTLEMENT OF ANNUAL ACCOUNTS — APPEALABLE ORDER — CONCLUSIVENESS UPON UNPAID CREDITORS — FINAL ACCOUNT.**—Though it is the proper practice for the administrator to obtain an order for the payment of general creditors, and without such order payments are made at his peril; yet where the payment of such claims is credited in his annual accounts, and such accounts are allowed and settled by the court, the order allowing them is not void, but is an appealable order, which, however ill-allowed or erroneous, becomes conclusive upon unpaid creditors who do not appeal therefrom; and the fact that an apparently solvent estate appears to be insolvent, upon settlement of the final account of the administrator, cannot authorize an attack by an unpaid creditor upon the items of payments to creditors allowed in the previous annual accounts of the administrator. (Estate of Fernandez, 579.)
31. **FAMILY ALLOWANCE—ORDER PRIOR TO INVENTORY—ALLOWANCE OF PAYMENTS AFTER INVENTORY.**—Payments made on account of family allowance after the filing of the inventory, without further or other order of the court than that made for such payments until the filing of the inventory, or until further order of the court, which were settled and allowed in the annual accounts, without appeal therefrom, cannot be objected to upon settlement of the final account because of the final insolvency of the estate; and a payment made by the administrator thereon after the last settlement of an annual account, in good faith, at a time when the estate was not known to be insolvent, and when the family was without other means of support, may be properly allowed by the court in the settlement of the final account. (Id.)
32. **COMMISSIONS OF ADMINISTRATOR—REAL ESTATE SOLD UNDER DEED OF TRUST.**—The commissions of the administrator are to be allowed upon the amount of the estate accounted for by him; but the valuation in the inventory is not conclusive evidence of such amount, and where real estate, inventoried at much more than the amount of a deed of trust, was sold under the deed of trust, the administrator cannot be allowed commissions upon its appraised value in the inventory, or upon any greater amount than the sum for which the property was actually sold. (Id.)
33. **CARRYING ON OF BUSINESS—CARE OF ANIMALS—ALLOWANCE OF EXPENSE.**—The expense of the proper caring by the administrator of sheep, lambs, cattle, hogs, horses, and colts, until they were sold, is not such carrying on of the business of the decedent as will make the administrator liable for loss and expense to the estate incurred on account thereof; but it was the duty of the administrator to care for them until they could be advantageously sold; and where the court found that the administrator managed the estate in a business-like manner, and used every necessary and pru-

ESTATES OF DECEASED PERSONS (Continued).

dent measure to protect it, he was properly allowed in his final account the expenses incurred in the care of such animals, notwithstanding the final insolvency of the estate. (Id.)

34. **DISTRIBUTION—PRETERMITTED HEIR—CONSTRUCTION OF STATUTE—FAILURE OF APPARENT PROVISION IN WILL—PAROL EVIDENCE INADMISSIBLE.**—The failure of an apparent provision in the will of a testatrix for the issue of a deceased child, by reason of the testatrix having parted with land devised to them, is not an "omission to provide," within the meaning of section 1307 of the Civil Code; and upon the petition of the grandchildren for a partial distribution of other estate of the testator, claiming as pretermitted heirs, parol evidence is inadmissible to show that the land devised to them was not owned by the testatrix at the time of the making of the will, or at the time of her death, and that the grandchildren had never received any part of the estate of the testatrix by way of advancement. (Estate of Callaghan, 571.)
35. **OBJECT OF STATUTE—FORGETFULNESS OF TESTATOR—MENTION IN WILL—MISTAKE NOT TO BE REFORMED.**—The object of the statute in regard to pretermitted heirs is not to compel the testator to make provisions for any child, but solely to protect the children against forgetful omission or oversight, and the failure to allude to them in the will is made evidence that they were omitted through forgetfulness of their existence; but when they are present to the mind of the testator, the statute affords no protection if provision is not made for them, and the fact that they are mentioned by the testator in the will is conclusive evidence that they were present to his mind; and, in such case, no mistake in the will in apparently, but not really, providing for them, can be reformed or corrected after the death of the testator; and parol evidence to show such mistake is inadmissible, where there is no question of imperfect description or identity of either the persons or property mentioned in the will. (Id.)
36. **APPEAL BY GUARDIAN OF MINORS—PARTIES—QUESTION UNDECIDED.**—The question whether an appeal can be properly taken in the name of a guardian of minor children as trustee of an express trust, or whether such appeal must be taken in the name of the ward, not decided; but held, Mr. Justice Temple, that such an appeal must be taken in the name of the ward, and should be dismissed, when taken in the name of the guardian. (Id.)
37. **RIGHT OF ADMINISTRATION—TRANSFER OF TITLE BY HEIRS—IMPROPER REVOCATION OF LETTERS.**—The heirs of a deceased person, who died without debts or other estate, cannot, by consent that there shall be no administration or real property belonging to the decedent, and by transfer of their title in such real estate, dispense with the rights of administration thereupon; and where letters of administration upon such real property were granted to the public administrator six years after the death of the decedent, the court cannot revoke his letters and set aside the proceeding for administration, because of such agreement and transfer

ESTATES OF DECEASED PERSONS (Continued).

on the part of the heirs, and upon the ground that there was no occasion for administration upon the said estate. (*Estate of Strong*, 663.)

38. **STATUTORY CONSTRUCTION—OBJECT OF ADMINISTRATION — PROBATE PROCEEDINGS STATUTORY AND SPECIAL — JURISDICTION — IMPROPER DISMISSAL—RIGHTS OF ADMINISTRATOR.**—The whole subject matter of dealing with the estates of deceased persons is one of statutory regulation, and the policy and intent of the statute is to subject estates of deceased persons to administration, for the purpose of ascertaining and protecting the rights of creditors and heirs and properly transmitting the title of record, and there is no other method of conclusively determining the existence or nonexistence of heirs or creditors; and the proceedings for administration being statutory and special in their nature, the jurisdiction of the superior court over them is circumscribed by the provisions of the statute conferring such jurisdiction, and it cannot competently proceed in a manner essentially different from that provided by statute, nor dispense with further proceedings nor deprive the administrator of his right to compensation and reimbursement of costs and expense of administration by an order setting aside and dismissing the proceedings. (*Id.*)

See Appeal 17-19; Mortgage, 20; Trust, 1-4, 7, 11; Will.

ESTOPPEL. See Appeal, 19; Contract, 17; Fraud, 4; Sale, 5.

EVIDENCE.

1. **IMMATERIAL ERROR.**—Error in the admission of evidence upon other matters not involving the question of mistake of fact upon which the judgment for plaintiff proceeds is without injury. (*Moore v. Copp*, 429.)
2. **PRIMA FACIE CASE OF MISTAKE—CONFLICT OF EVIDENCE.**—Where the evidence for the plaintiff standing alone establishes a prima facie case of mistake, and the trial judge accepted her evidence as true, though contradicted by the evidence for the defendant, the appellate court is not at liberty to inquire into the relative weight of the conflicting evidence. (*Id.*)

See Contract, 2, 12, 14; Corporations, 1-5; Criminal Law, 13, 15-19, 23, 24, 39-41, 68, 70-72, 74, 75, 80, 83-85; Debtor and Creditor, 2; Divorce, 1, 6, 7; Estates of Deceased Persons, 34; Guaranty, 1; Libel, 1-4, 6-9; Mines and Mining, 4; Mortgage, 36, 37; Negligence, 1, 2; New Trial, 1; Quieting Title, 1.

EXECUTION.

1. **FEES OF SHERIFF—LEVY UNDER EXECUTION—JUDGMENT LIEN—ATTACHMENT—NOTICE OF SALE—ILLEGAL EXACTION OF FEES—RECOVERY BACK.**—A sheriff can exact legal fees only for such acts as are necessary to a full performance of his duty, so as to protect him against any charge of dereliction, and for none others; and where the judgment under which real property is sold under execution is a lien upon the land sold, it is a sufficient seizure and levy under

EXECUTION (Continued).

the execution, to give the statutory notice of sale of the land under the execution, and the sheriff cannot legally exact fees for levying the execution upon the land in such cases in the manner in which a writ of attachment is levied, and fees illegally exacted for such levy may be recovered back from the sheriff by the judgment debtor or his assignee. (*Lehnhardt v. Jennings*, 192.)

2. **LANDS OF RECORD IN NAMES OF THIRD PARTIES—MODE OF LEVY OF EXECUTION—INTEREST OF DEFENDANT.**—The fact that some of the land upon which the sheriff levied stood on the records of the county in the name of persons not parties to the writ does not require that the levy of the execution should be different in case of such land, nor that there should be any notice other than that given to the general public by the ordinary posting and advertisement of sale; and, in such case, the judgment lien, levy, and sale can only operate on such interest in the land as may be in fact owned by the defendant. (*Id.*)
3. **PROCEEDINGS IN AID OF EXECUTION—FINDINGS NOT REQUIRED.**—Proceedings in aid of execution are only a summary method of purging the debtor's conscience, and compelling the disclosure of any property he may have which is subject to execution; and it is not incumbent upon the court to make express findings in special proceedings of this character, and the action of the court cannot be reversed for want of such findings. (*Lyons v. Marcher*, 382.)
4. **EXEMPTION OF COMBINED HARVESTER.**—Under section 690 of the Code of Civil Procedure a "combined harvester" is a farming utensil and an implement of husbandry, irrespective of its value, and if used chiefly for the farming purposes of a debtor, although occasionally used for others, is exempt from execution. (*Estate of Klemp*, 41.)

See Justices' Court; Mortgage, 17; Quieting Title, 6; Sale, 5.

EXECUTORS AND ADMINISTRATORS. See *Estates of Deceased Persons*.

FEES. See *Execution*, 1.

FENCE. See *Statute of Limitations*, 2.

FINDINGS.

1. **PROBATIVE FACTS—ISSUES RENDERED IMMATERIAL.**—A finding of probative facts is sufficient when the ultimate facts follow therefrom; and when the findings show a clear case of mistake of fact upon the part of the plaintiff, whether involving fraud therein or not, a separate finding upon the question of actual fraud is not required; and it is immaterial whether other findings are or are not sustained by the evidence. (*Moore v. Coop*, 429.)
2. **SUPPORT BY EVIDENCE—REVIEW UPON APPEAL.**—Where a finding which absolutely points the judgment against the appellant is supported by the evidence, the fact that other findings are not sup-

FINDINGS (Continued).

ported by the evidence becomes immaterial, and is not ground of reversal. (*Wheat v. Bank of California*, 4.)

See Corporations, 5; Divorce, 1, 2, 4, 5; Execution, 3; Mortgage, 35.

FRANCHISE. See Municipal Corporations, 17, 18.

FRAUD.

1. ACTION FOR DECEIT—PROCUREMENT OF NOTE BY FRAUD—AGREEMENT AS TO USE OF PIANO—SUFFICIENCY OF COMPLAINT—RESCISSION.—In an action for deceit, a complaint alleging, in substance, that defendant, through his agent obtained permission to place a piano of latest pattern in plaintiff's house for exhibition to intending purchasers of such instrument, with an agreement that plaintiff might have the use of it for a year, with privilege of purchasing the same if desired, and obtained her signature to a note for four hundred dollars, payable in one year, with interest at ten per cent per annum, under a trick and fraudulent representation that she was signing a receipt for the piano containing the terms of the agreement, and that defendant delivered an old, wornout instrument of no value, whereupon plaintiff offered to return the piano and defendant refused to receive it, and negotiated the note to a bank, which had recovered judgment thereon, which plaintiff was compelled to pay, states a sufficient cause of action for the deceitful obtaining of the note for which plaintiff received no consideration and which was used to her damage, and it is not necessary to show a rescission of a sale, which did not in fact exist. (*Wilder v. Beede*, 646.)

2. FRAUD OF ASSUMED AGENT—ADOPTION OF ACTS—LIABILITY OF DEFENDANT.—Where the evidence showed that one assuming to be defendant's agent obtained plaintiff's note fraudulently, and that plaintiff was compelled to pay the same, and that defendant, who was a son of the owner of the piano, and had authority from her to sell it for two hundred and twenty-five dollars, before the paper was signed by plaintiff ascertained that a bank would discount plaintiff's note, and prepared a note payable to himself in the sum of four hundred dollars, which the assumed agent of defendant then fraudulently obtained from plaintiff under the representation that defendant was the owner of the piano, and defendant then immediately discounted it to the bank, and disposed of the proceeds, paying the excess of price to the assumed agent, the jury were at liberty to infer that the defendant accepted the note as one obtained by his own agent, and if such agent was self-constituted, defendant having accepted the note from him, knowing that it had been executed in advance of the delivery of the piano, and for a sum largely in excess of the value, was put upon inquiry into the acts and representations by which such agent had procured the paper, and, not having made such inquiry, the jury might find that he meant to take upon himself, without further information, the risk of any misconduct by such agent, and not to adopt all his acts. (*Id.*)

FRAUD (Continued.)

3. **AGENCY OF DEFENDANT IMMATERIAL—ASSUMPTION OF CHARACTER OF PRINCIPAL.**—The fact that the defendant was himself the agent of his mother and did not personally profit by the fraud of his assumed agent in obtaining the note, is immaterial, he having fully assumed in the supposed contract evidenced by the note the character of a principal, and allowed his assumed agent and the bank to treat him as such, and intended that plaintiff should regard him in that character. (Id.)
4. **PLAINTIFF NOT ESTOPPED BY BILL OF SALE, AND DELAY NOT INJURIOUS TO DEFENDANT.**—The fact that defendant remitted a bill of sale of the piano executed by his mother to the plaintiff, and that plaintiff omitted for nine months to insist on defendant removing the piano from the house, does not estop nor conclude the defendant from disputing the sale, nor constitute a waiver of the fraud, as matter of law, the defendant not having in any way changed his position on account of her delay, and she having had the right, under the terms of the actual contract, to the use of the piano for one year. (Id.)

See Contract, 4; Estates of Deceased Persons, 15; Insolvency, 2; Judgment, 1; Quieting Title, 4, 5.

GRANTOR AND GRANTEE. See Boundaries.

GUARANTY.

1. **NOTE GIVEN TO SECURE ANOTHER—INDORSEMENT PART OF CONTRACT—PAROL EVIDENCE INADMISSIBLE—GUARANTY FOR DEFICIENCY OF MORTGAGE SECURITY.**—An indorsement written upon a note at request of the maker before its execution, stating that it is given for the purpose of securing the payment of a note of the same date and amount of another person to the same payee, becomes part of the contract of the maker, though the indorsement is signed by the payee and not by the maker, and the agreement as written, taken with the admissions in the pleadings, constitute a contract of guaranty for the payment of the other note in full; and parol evidence is inadmissible to vary the terms of the guaranty as expressed by proof that the contract was one of guaranty only for the payment of any deficiency resulting after the sale of property mortgaged by the maker of the other note to the payee as security therefor. (Adams v. Wallace, 67.)
2. **ADMISSION OF GUARANTY—AVERMENT OF ANSWER.**—The defendant cannot complain that the court regarded the contract between the parties as one of guaranty, as distinguished from a general contract of suretyship, where the answer pleads that the contract was one of guaranty made at the request of plaintiff, and not of the maker of the other note, whereby defendant promised and agreed with plaintiff to answer for the debt or default of such maker. (Id.)
3. **DISTINCTION BETWEEN GUARANTOR AND SURETY—EXHAUSTION OF CREDITOR'S REMEDIES AGAINST PRINCIPAL DEBTOR.**—One who is a mere surety, as distinguished from a guarantor, has the right to demand that the creditor shall first apply the property of the

GUARANTY (Continued).

principal debtor to the discharge of the debt; but the creditor has the right to sue a guarantor, upon default of the principal debtor, without proceeding first to realize upon other securities, or to foreclose a mortgage given by such debtor. (Id.)

4. **ACTION UPON DEBT SECURED BY MORTGAGE—CONSTRUCTION OF CODE—INDEPENDENT CONTRACT—NOTE GIVEN AS SECURITY.**—An action upon a note given as security for another note, which is also secured by mortgage, is not violative of section 776 of the Code of Civil Procedure, but is an action upon an independent contract, with which the mortgagor has nothing to do, and which may be maintained against the maker of such note without foreclosure of the mortgage security. (Id.)
5. **PRINCIPAL DEBTOR AND GUARANTOR NOT JOINTLY LIABLE.**—There is no privity, or mutuality, or joint liability between the principal debtor and his guarantor. (Id.)

GUARDIAN AND WARD.

1. **ACCOUNTING—EXPENSES FOR CARE OF WARD—PROVISIONS OF WILL.**—In an action by a ward against the estate of his deceased guardian for an accounting of moneys belonging to him, which came into the possession of the guardian, the defendant is not entitled to credit for the expenses incurred by the guardian in maintaining the ward during his minority, if by her will the guardian directs that no charge shall be made against the ward for any moneys loaned him, or for any expense she had been to on his account during her lifetime. (Porter v. Fillebrown, 235.)
2. **FORM OF ACTION—AMENDMENT OF COMPLAINT.**—Where the claim of the ward, as presented against the estate of the guardian, set out in detail all the facts necessary to establish the liability of the guardian for an accounting, and the action thereon, as originally brought, was in form a mere action at law for the amount received by the guardian, which was less than three hundred dollars, it is not error for the court to allow the plaintiff to amend his complaint so as to make it an equitable action for an accounting of the trust arising under the guardianship, and thus within the jurisdiction of the superior court. (Id.)

See Criminal Law, 2.

HABEAS CORPUS. See Appeal, 21; Criminal Law, 1, 3, 7, 9-12; Divorce, 8.

HOME FOR INEBRIATES.

1. **HOME FOR INEBRIATES—DEDICATION OF LOT TO PUBLIC USE—PRIVATE CORPORATION—TITLE OF CITY AND COUNTY.**—The dedication of a lot in the city and county of San Francisco for a "Home for Inebriates," by virtue of proceedings had under Order 800, reserved the lot from private occupation, and dedicated it to a public use, and a private corporation known as the "Home for the Care of the Inebriate," without any of the elements of a public agency, can have no right to the lot, or to its possession under such proceedings, but the title

HOME FOR INEBRIATES (Continued).

remained in the city and county for the public use designated. (*Home for Care of Inebriate v. City and County of San Francisco*, 534.)

2. **CONSTRUCTION OF ACT OF 1870—ACTION TO QUIET TITLE OF PRIVATE CORPORATION—JUDGMENT FOR CITY AND COUNTY—PRESUMPTIONS UPON APPEAL.**—In an action to quiet the title of such private corporation against the city and county of San Francisco to such lot where plaintiff claimed title under the act of April 1, 1870, purporting to vest the title of the city and county in such corporation to a lot described therein merely as "set apart by the board of supervisors of San Francisco, or a committee of said board, to and for a corporation known as the 'Home for the Care of the Inebriate,'" upon appeal from a judgment quieting the title of the city and county, where there is no evidence or finding in the record to show that any lot was ever set apart to such corporation, or that the lot dedicated by the city to public use was ever intended for such corporation, it must be presumed that the "Home for Inebriates" described in Order 800 was not a corporation, and was not the same organization as the private corporation, "Home for the Care of the Inebriate," and that, inasmuch as the board of supervisors could set apart the land only for public uses, it did not set apart the lot in question for the private use of the plaintiff, and it must be presumed further that there was no evidence from which any finding could be made that plaintiff was the beneficiary intended by the board of supervisors. (*Id.*)

HOMESTEAD. See Mortgages, 27-29.

HUSBAND AND WIFE. See Divorce; Estates of Deceased Persons, 14; Parent and Child.

INJUNCTION.

1. **RELATIVE EQUITIES.**—A court of chancery will not interpose by injunction as of course after the right of the plaintiff has been established at law; but it will consider the circumstances, the consequences of such action, and the real equity of the case; and each case must be governed by the circumstances that surround it, and by relative equities. (*Peterson v. Santa Rosa*, 387.)
2. **RIGHTS OF RIPARIAN OWNER—POLLUTION OF STREAM BY SEWAGE—NUISANCE—INJUNCTION AGAINST MUNICIPAL CORPORATION.**—A riparian owner has a right of property in the waters of the stream, as appurtenant to the land, and is entitled to have it flow in its natural purity, and may enjoin as an actionable nuisance the pollution of the stream by a municipal corporation which has caused sewage to flow therein, so as substantially to impair its value for ordinary purposes, and to render it at times offensive to the senses and unfit for domestic use, and the fact that the defendant is a municipal corporation does not enhance its rights, or palliate its wrongs in this respect. (*Id.*)
3. **SUPPLEMENTAL ANSWER—CONSTRUCTION OF SEWAGE PLANT—DEODORIZATION OF SEWAGE—FITNESS FOR DOMESTIC USE—BURDEN OF**

INJUNCTION (Continued).

PROOF — PRESUMPTION.—A supplemental answer by the municipal corporation, setting forth that, since the commencement of the action, it had constructed and was operating a sewage plant, which rendered the sewage water clear and inodorous, does not constitute a defense to the injunction, in the absence of a showing that the water was rendered palatable and fit for use; and prior findings having established that the water of the stream was rendered unfit for use by the sewage, the burden of showing a change in that respect rested upon the defendant, and it must be presumed, in the absence of such a showing, that the water in that respect had not undergone a change. (Id.)

See **Boundaries; Municipal Corporations, 18; Streets, Roads and Highways; Sureties; Taxation, 5.**

INNKEEPERS. See **Criminal Law, 25.**

INSANITY. See **Criminal Law, 46-50, 52.**

INSOLVENCY.

1. **SALE BY ASSIGNEE—MOTION TO VACATE—GROUNDS OF EQUITABLE RELIEF.**—Where an assignee in insolvency has made a sale by order of the court, which may be set aside upon equitable grounds, the assignee need not resort to a bill in equity, but may preferably move the court which made the order to set it aside upon any ground of equitable cognizance, and the court will particularly entertain such application, where deception was practiced or a mistake induced by the act of the purchaser, due regard being had to the intervening rights of third persons. (*Thompson v. Superior Court*, 538.)

2. **SALE OF WATER PIPE—FRAUD OF PURCHASER—CONDITIONAL ORDER VACATING SALE—REIMBURSEMENT OF PURCHASER—JURISDICTION.**—The superior court has jurisdiction to make a conditional order vacating a sale of waterpipe, made to a purchaser for much less than its value, by reason of his fraudulent representations as to the quantity of the pipe, which was unknown to the assignee, and such order may be conditioned upon the payment to the purchaser by the assignee of a sum sufficient to reimburse the purchaser for his outlay. (Id.)

3. **EXTINCTION OF OBLIGATION OF ASSIGNEE—COMPLIANCE WITH CODE—PAYMENT INTO COURT—DUTY OF PURCHASER—CONTEMPT.**—The assignee may extinguish the obligation to pay money to the purchaser, imposed by the conditional order vacating the sale, by compliance with section 1500 of the code, and, if no tender or offer of payment could be made to the purchaser through his fault, he may make showing thereof to the court, and pay the money into court for the purchaser, and it would then be the duty of the purchaser to deliver the pipe to the assignee, and, upon refusal to do so, he would be in contempt, and might be committed until he should deliver it. (Id.)

4. **EX PARTE MODIFICATION OF ORDER—NOTICE OF HEARING ESSENTIAL—WANT OF JURISDICTION—CERTIORARI.**—The court had no jurisdic-

INSOLVENCY (Continued).

tion, on an *ex parte* application of the assignee, to modify the conditional order setting aside the sale, so as to make the order absolute, and direct the delivery of the property, without payment of the money required by the conditional order to be paid to the purchaser, and such *ex parte* modification must be annulled upon *certiorari*. (Id.)

5. **PRIOR HEARING—DISMISSAL OF CONTEMPT PROCEEDING—REFERENCE TO AFFIDAVITS USED.**—Where contempt proceedings against the purchaser, to which he was a party upon a prior hearing, were dismissed, the affidavits used thereupon have performed their function, and no subsequent *ex parte* application for a modification of the conditional order vacating the sale could be aided by reference to such affidavits. (Id.)

6. **INVOLUNTARY INSOLVENCY—INSUFFICIENT VERIFICATION OF PETITION—JURISDICTIONAL REQUIREMENT—VOID PETITION NOT AMENDABLE—CONSTRUCTION OF CODE.**—The verification of a petition in involuntary insolvency by three creditors of the insolvent is necessary to the validity of the petition, and the requirement of it is jurisdictional; and where it appeared that at the time of the verification of the petition by three creditors it contained only averments in reference to their claims, and that the claims of two other creditors verifying the petition were subsequently inserted the verification by the three creditors is a nullity, and the petition, not being verified as required by the statute, is void, and, being void, is not amendable under section 9 of the Insolvent Act, which is intended to provide only for the amendment of a valid petition, and does not refer to a void petition which no amendment can validate, so as to confer upon the court jurisdiction of the subject matter of the proceeding which it did not previously have. (Matter of Visalia City Water Company, 561.)

7. **FORM OF BOND.**—The Insolvency Act contemplates the filing of a bond with two sureties, and all the petitioning creditors as principals. (Id.)

See Estates of Deceased Persons, 30; Judgment, 3-5.

INSTRUCTIONS. See Criminal Law, 20-22, 34, 43, 44, 46, 50-55, 73, 76-79; Damages; Libel, 6, 10; Malicious Prosecution.

INTEREST. See Claim and Delivery, 5; Municipal Corporations, 15.

INTERVENTION. See Receiver.

IRRIGATION DISTRICT.

1. **WRIGHT ACT—SPECIAL TAX—SEGREGATION INTO SEPARATE FUNDS.**—Under the provisions of the Wright act, a lump sum of money raised by an irrigation district by a special tax, in pursuance of an authorization given by the qualified electors, which directed it to be raised for certain specified purposes, is all equally applicable to the payment of indebtedness incurred for any of such purposes, and the directors of the district have no power to segregate it into several funds corresponding to the purposes specified, so as to limit the right of payment of a legitimate indebtedness to the

IRRIGATION DISTRICT (Continued).

amount by them directed to be placed to the credit of a particular fund. (Carter v. Tilghman, 104.)

2. **FORM OF WARRANT.**—The fact that a warrant issued by the district for a legitimate indebtedness incurred for one of such purposes, contained a direction that the amount paid thereon should be charged against a particular fund, did not limit the right of the holder to payment from any funds in the hands of the treasurer applicable thereto. (Id.)
3. **INDEBTEDNESS INCURRED PRIOR TO TAX.**—It is no objection to the payment of the warrant that it was issued prior to the time when the particular money was raised by such special tax. (Id.)

JOINT DEBTORS. See Debtor and Creditor.

JUDGE. See Contempt.

JUDGMENT.

1. **PRACTICE—JUDGMENT BY DEFAULT—MOTION TO SET ASIDE—FRAUD.** Under section 473 of the Code of Civil Procedure, a judgment regular on its face, against a defendant who had been personally served with the summons and the original complaint, and entered upon his default in not answering an amended complaint which had been properly served upon his attorney of record, cannot be set aside on motion, on the ground of the alleged fraud of the attorney for the plaintiff in not serving the amended complaint personally on the defendant, in pursuance of a verbal agreement to that effect, after the expiration of six months from the entry of the judgment. (Young v. Fink, 107.)
2. **MUNICIPAL CORPORATIONS—FORM OF JUDGMENT.**—A judgment against a municipality should be in form a general judgment, although it and the liability on which it is based can, under section 18 of article XI of the constitution, only be paid out of the municipal revenues of the fiscal year in which the liability was incurred. (Buck v. Eureka, 44.)
3. **VACATING JUDGMENT BY DEFAULT—AFFIDAVIT OF MERITS—DISCHARGE IN INSOLVENCY NOT A TECHNICAL DEFENSE.**—A discharge in bankruptcy or insolvency, disclosed in an affidavit of merits upon motion to vacate a judgment by default, upon the ground of excusable neglect, is not a technical defense rendering the affidavit of merits insufficient, but, like payment or release, is a plea in bar which goes to the merits of the action, and is a defense recognized by the statute, which, when properly interposed, is effectual and conclusive; and, where the showing of excusable neglect is sufficient to justify an order vacating the judgment to let in such defense, the order must be affirmed. (Tuttle v. Scott, 586.)
4. **NECESSITY OF PLEADING DISCHARGE FROM DEBT—RELIEF FROM JUDGMENT.**—The necessity of pleading a discharge from the debt sued upon in insolvency or bankruptcy, in order to prevent being

JUDGMENT (Continued).

bound by the judgment, does not preclude the granting of relief against the judgment, under section 473 of the Code of Civil Procedure, but the existence of the rule that a defense must be pleaded created the necessity for the enactment of that section, in order that parties bringing themselves within its provisions might be so relieved. (Id.)

5. **EXCUSABLE NEGLIGENCE—RELIANCE UPON ADVICE OF COUNSEL.**—Reliance of an insolvent debtor upon the advice of counsel as to the effect of his adjudication in insolvency, which led the insolvent to believe that the efforts of plaintiff to collect his claim as against the insolvent must be confined to the insolvent court, and to such dividends as he had there received, and which led him to pay no attention to a joint action against the defendant and another maker of the note in suit, is a sufficient excuse for his neglect to answer before judgment to justify the opening of a judgment by default to let in the defense of his discharge in insolvency. (Id.)
6. **JUDGMENT BY DEFAULT—SERVICE OF SUMMONS—INSUFFICIENT AFFIDAVIT—APPEAL.**—An affidavit of the service of summons which fails to show any service thereof upon an appealing defendant, and upon which no charge of perjury could be sustained, no other proof of service appearing in the record, is insufficient to authorize the clerk to enter a judgment by default against him, or to sustain such judgment upon a direct appeal therefrom. (Linott v. Rowland, 452.)
7. **AMENDMENT OF COMPLAINT AFTER DEFAULT—VACATION OF DEFAULT—OMISSION OF SERVICE—SUPPORT OF JUDGMENT.**—The filing of an amended complaint supersedes the original; and where the complaint is amended in matter of substance after the default of a defendant has been entered, it has the effect to vacate the default; and, if such amended complaint is not served upon the defaulting defendant, there is no pleading upon which a judgment against him can be sustained. (Id.)
8. **ORDER REFUSING TO QUASH EXECUTION—APPEAL—INSUFFICIENT RECORD—DISMISSAL.**—An appeal from an order refusing to quash an execution issued upon a judgment by default will be dismissed, where the record contains no bill of exceptions relating to the order, and no stipulation from which it can be determined upon what papers the motion was heard. (Id.)

See Appeal, 7-9, 21, 22; Estates of Deceased Persons, 7, 8, 11, 13, 27-29; Execution, 1; Mortgage, 1, 3; Receiver, 1.

JURISDICTION.

AMOUNT IN CONTROVERSY—PRAYER.—The prayer of a complaint is not conclusive of the jurisdiction of the superior court if the record shows on its face that the dispute concerning an amount within the competence of that court to consider is feigned and not real. (Schuhardt v. Jennings, 192.)

See Appeal, 19; Criminal Law, 3; Divorce, 8; Election, 1; Estates of Deceased Persons, 8, 10, 19, 22; Insolvency, 2, 4, 6; Justices' Court.

JURY AND JURORS.

1. **ACTION ON CONTRACT.**—An action to recover money upon a promissory note, and for the breach of a contract entered into simultaneously therewith, in which no equitable issues are raised, is an action at law, in which the defendant is entitled to a jury trial. (*Platt v. Havens*, 244.)
2. **WAIVER OF JURY.**—A stipulation to set the action for trial on a day certain before a department of the superior court then known to be engaged in the trial of causes without a jury is not a waiver of the right to a trial by jury. Such right cannot be waived by implication. (*Id.*)

See Criminal Law, 1, 2, 5, 42.

JUSTICE'S COURT.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION—ORDER TO DEBTOR NOT APPEALABLE—JURISDICTION OF SUPERIOR COURT—PROHIBITION.—An order made by a justice's court in proceedings supplementary to execution, requiring the judgment debtor to apply designated property to the satisfaction of the judgment, is not in the nature of a judgment, and is not appealable to the superior court; and the superior court and the judge thereof, having no jurisdiction of an appeal therefrom, will be restrained by writ of prohibition from this court from proceeding to try said appeal, and that court will be directed to dismiss the appeal. (*Wells v. Torrance*, 437.)

See Criminal Law, 3.

LACHES. See Estates of Deceased Persons, 15.

LANDLORD AND TENANT. See Claim and Delivery, 2-4.

LEASE. See Claim and Delivery, 2-4; Contract, 17, 18.

LEGACY. See Will.

LIBEL.

1. **JUSTIFICATION—IMMATERIAL VARIANCE—PROOF OF CHARGE.**—A defendant in an action of slander or libel is not required to justify every word of the defamatory matter, but it is sufficient if the substance, gist, or sting of the libelous charge be justified, and immaterial variances and defects of proof upon minor matters are to be disregarded if the substance of the charge be justified. (*Hearne v. De Young*, 670.)
2. **DIVORCE FOR EXTREME CRUELTY—VARIANCE AS TO ACTS OF CRUELTY PUBLISHED—EVIDENCE OF OTHER VIOLENT ASSAULTS.**—Where, in publishing a report of the proceedings had in an action for divorce upon the ground of extreme cruelty, in which a decree for the plaintiff had been granted, it was stated that at the trial evidence was introduced showing that the defendant in the divorce suit, who was plaintiff in the libel suit, was a man of most ungovernable temper, and that such incidents as the hurling of dishes at his wife when engaged in argument were referred to by the witnesses for the prosecution, the sting or gist of the charge is that he had assaulted his

JUDGMENT (Continued).

bound by the judgment, does not preclude against the judgment, under section 473 procedure, but the existence of the rule that created the necessity for the enactment parties bringing themselves within it, believed. (Id.)

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5. **EXCUSABLE NEGLIGENCE—RELIANCE**—Where a second publication of an insolvent debtor upon the same charge, may be effect of his adjudication in the original publication, and to believe that the efforts of the insolvent must be confirmed by the second publication look dividends as he had there reason for rejection of the attention to a joint action evidence. (Id.)

of the note in suit, is a **ADMISSIBLE**.—Where it does not before judgment to justify a publication alleged to be libelous knew to let in the defense of the circumstances save what they

6. **JUDGMENT BY DEFENDANT—APPEAL**.—Where a publication alleged to be libelous knew to show any service to readers as to the meaning of the publication which no charge appears.)

SERVICE APPEARANCE OF WORDS—PROVINCE OF JURY.—The common intention to enter a judgment upon a published article must be applied to test its character, the publishers' intentions are to be gauged by such

7. **AMENDMENT**.—The reader's understanding of it must be based upon the words used. (Id.)

is amended **JOINT ACTION—DECLARATIONS OF CORRESPONDENT—EXAMINATION—MALICE—INSTRUCTIONS—DAMAGES**.—In a joint action against a publisher of a newspaper and a correspondent, who may be said to be an agent of the publisher, evidence is admissible to show statements made by the correspondent after the publication of

8. **CHARGE OF CRIME—PROOF OF JUSTIFICATION—PREPONDERANCE OF EVIDENCE**.—Where the libel published charges upon plaintiff the commission of a crime, it is not necessary that the commission of the crime be proved beyond a reasonable doubt, but a preponderance of evidence is sufficient to establish a justification. (Id.)

7. **CHARGE OF CRIME—PROOF OF JUSTIFICATION—PREPONDERANCE OF EVIDENCE**.—Where the libel published charges upon plaintiff the commission of a crime, it is not necessary that the commission of the crime be proved beyond a reasonable doubt, but a preponderance of evidence is sufficient to establish a justification. (Id.)

8. **EVIDENCE—MALICIOUS PURPOSE—REITERATED PUBLICATION AFTER SUIT BROUGHT—PRIVILEGED MATTER**.—Where the publishers of a newspaper, sued for libel, have answered, justifying on the ground of the truth of the charge, and also pleading in mitigation

LIBEL (Continued).

that the publication was made in good faith and without actual malice, a publication made after the commencement of the suit which, while not repeating the words, refers specifically to the terms of the first article, and is in substantial effect a reiteration of its substance, the language relating to the same subject matter and being of a character from which a malicious purpose might be inferred, is admissible upon the question of actual malice; and the fact that the article contained a privileged reference to the commencement of the action, cannot operate to exclude it, there being substantial repetition of libelous matter therein not covered by the privilege. (*Westerfield v. Scripps*, 607.)

9. **KNOWLEDGE OF PUBLISHERS—AVERMENT OF TRUTH—FAILURE OF PROOF—PRESUMPTIVE EVIDENCE—BURDEN OF PROOF.**—Testimony on the part of the publishers that the first libelous article published was by the employees of the defendants without their knowledge or consent, is not conclusive upon the question of malice in fact, where there are circumstances from which the jury were at liberty to find against such testimony; and the assertion in the answer of the truth of the statements made in the original publication, without apparent investigation to ascertain their truth, and without any effort to prove them at the trial, is in itself a circumstance which the jury may consider as tending to contradict the testimony on behalf of defendants on the question of malice, and the publication of the second article is also a circumstance tending to contradict such evidence; nor is it incumbent upon plaintiff to show that the publishers had knowledge of such second publication, but the fact of its publication in their paper is presumptive evidence of their knowledge, the burden of overcoming which rested with them. (*Id.*)
10. **EXEMPLARY DAMAGES—APPLICABILITY OF INSTRUCTION.**—Where there was evidence upon which the jury were authorized to find that the publication was made with actual malice, an instruction relating to exemplary damages is properly applicable. (*Id.*)
11. **EFFECT OF PLEA OF JUSTIFICATION—QUESTION OF GOOD FAITH—PROPER INSTRUCTION.**—An instruction with reference to the defendant's plea of justification, that defendants having alleged their publication to be true, and reasserted the same in their answer, the jury were entitled to consider the good faith or want of good faith in which such answer was made, and that when a defendant republishes a libelous charge by making it a record of the court, he does it at his own risk, and if at the trial he fails to prove its truth, and did not in good faith expect to prove its truth, he intensifies the original wrong, is properly given. (*Id.*)

LICENSE. See County.

LIEN. See Mechanics' Lien; Mortgage.

LIS PENDENS. See Mortgage, 19.

MALICE. See Libel, 3, 6, 8.

MALICIOUS PROSECUTION.

1. **ARREST UPON CRIMINAL CHARGE—INSTRUCTIONS—IMPROPER CHARGE AS TO ADMISSION OF ANSWER.**—In an action for a malicious prosecution of the plaintiff upon a criminal charge, where the separate answer of a defendant not appealing admitted that he had filed the complaint with a justice of the peace charging the plaintiff with a criminal offense, and the separate answer of the defendant appealing contained no admission that such complaint was filed by him, it is a substantial error against such appellant for the court to charge the jury that it was admitted by the answer of the defendants "that the defendants did file a complaint with a justice of the peace charging the plaintiff with a criminal offense." (*Seabridge v. McAdam*, 460.)
2. **ADVICE OF COUNSEL—IMPROPER INSTRUCTION AS TO GOOD FAITH OF COUNSEL.**—An instruction as to protection of the defendant from a malicious prosecution under advice of counsel, stating that "such advice must be sought and given in good faith and with an honest purpose," is erroneous, the question of the good faith of counsel in giving the advice not being an element in the problem. (*Id.*)

MANDAMUS. See Appeal, 12; Municipal Corporations, 2, 8, 16,

MASTER AND SERVANT. See Negligence, 3-6.

MEASURE OF DAMAGES. See Damages.

MECHANIC'S LIEN.

1. **CONTRACT FOR MATERIALS—RECORD, WHEN NOT REQUIRED.**—Where a lessee, for the purpose of constructing certain additions to the premises leased, purchased materials therefor of less value than one thousand dollars, the provisions of the code relating to a written contract and filing the same for record have no application. (*Santa Monica Lumber, etc., Co. v. Hege*, 376.)
2. **LIEN FOR MATERIALS—TIME FOR NOTICE—COMPLETION OF BUILDING—PREMATURE FILING.**—The lessee having caused the improvements to be constructed for himself, the party furnishing the materials was not an original contractor, and must file a notice of lien within thirty days after the completion of the building; and unless the building was completed before the notice of lien was filed, the filing was premature, and conferred no right to enforce the lien. (*Id.*)
3. **FINDING—COMPLETION BEFORE NOTICE—DATE IMMATERIAL—CONFLICT OF EVIDENCE.**—A finding that the building was completed at a particular date, which was prior to the notice of lien, is not material so far as the date is concerned; and though there may be no evidence as to the date of completion, it is sufficient that there is evidence tending to show that the building was completed before the notice of lien was filed, and the finding cannot be disturbed on account of conflicting evidence upon that issue. (*Id.*)

MECHANICS' LIEN (Continued).

4. **TEST OF COMPLETION—ABSENCE OF PLANS—PRESUMPTION—MATTERS NOT INCLUDED—TRIVIAL IMPERFECTION.**—In the absence of any plans of the building, or means of test by which it could be determined when the building was completed, its completion must be determined by the court from all the circumstances of the case shown by the evidence; and where it appeared that no sidewalk was ever constructed, that the building was never painted, and that no eave-troughs or waterclosets were ever constructed, it is to be presumed, in the absence of evidence to the contrary, that the original plans of the building, did not include any of these matters and the court might properly so find; and the failure to make the ridge of the roof tight, and to putty the glass on the outside, is merely a defective performance of the work rather than a failure of completion, and was properly disregarded as a "trivial imperfection." (Id.)
5. **CONSTRUCTION BY LESSEE—LIABILITY OF OWNER—ABSENCE OF NOTICE.**—Where improvements to the building were constructed by the lessee with the previous knowledge and permission of the owner, his failure to give the notice required by section 1192 of the Code of Civil Procedure rendered his interest in the land subject to the lien of one furnishing materials for the improvements; and it is immaterial whether they were constructed in the particular form, or at the particular place which was authorized by the owner. (Id.)
6. **VOID NOTICE OF LIEN—INCORRECT STATEMENT AS TO CONTRACT PRICE—VARIANCE.**—The right to enforce a mechanic's lien depends upon a compliance with the statute; and not only must the notice of lien contain the statements required by section 1187 of the Code of Civil Procedure, but the statements thus made must be in accordance with the facts, and if they are not correctly stated the right to a lien is lost; and though proof that the contract was for the "regular market price" is not a substantial variance from an allegation that the contract was for what the materials were reasonably worth; yet where the notice incorrectly stated the amount of the balance due as the amount of the contract price of the lumber, and that no part thereof had been paid, proof that the contract was for a considerably larger price and that payments had been made thereon, shows a fatal variance in the terms of the contract from that stated in the notice, and renders the notice of lien defective and void. (Id.)
7. **DISTINCTION AS TO VARIANCE—PLEADING AND PROOF—NOTICE OF LIEN AND PROOF.**—The effect of a variance between the pleading and proof is not governed by the same rules as in the case of a variance between the notice of lien and the proof. A variance between the pleading and proof is not material unless the adverse party has been misled thereby to his prejudice, while a variance between the notice of lien and the proof, showing that the statement of the contract set forth in the notice was untrue, is fatal to the lien. (Id.)
8. **BUILDING CONTRACT UNDER ONE THOUSAND DOLLARS—RIGHTS OF CONTRACTING PARTIES—CONSTRUCTION OF CODE.**—Where the contract price for the erection of a building is less than

MECHANICS' LIEN (Continued).

one thousand dollars, the provisions of sections 1184 of the Code of Civil Procedure, relative to the mode and time of payment, and the withholding of a percentage of the contract price for the benefit of lienholders, are not applicable; and it is permissible for the parties to contract for the payment of the whole amount before the commencement of the work, or after the completion of the building. (*Denison v. Burrell*, 180.)

9. **ABANDONMENT OF CONTRACT—COMPLETION OF BUILDING BY OWNER --RIGHTS OF LIEN CLAIMANTS.**—The contract for less than one thousand dollars being valid, the liens of mechanics and material men cannot be claimed for a greater amount than the sum due and unpaid to the contractor; and if nothing was due the contractor at the time of his abandonment of the contract, and he was to be paid by the terms of the contract only upon completion of the building, liens cannot be claimed for a proportional part of the contract price earned at the date of abandonment by the contractor, and if the building is completed by the owner of the building substantially as called for by the contract, the amount available for the liens of those who had furnished labor or materials to the contractor would be only the excess of the contract price remaining in the owner's hands after payment of the cost of completion. (*Id.*)

MINES AND MINING.

1. **MINING CORPORATIONS—RIVER MINING—USE OF DREDGING BOAT—FAILURE TO POST ACCOUNTS—STATUTORY LIABILITY OF DIRECTORS.**—A corporation organized under the laws of this state for the purpose of mining, which carried on mining operations in the bed of the Sacramento river, by the use of a dredging boat, and appliances for the purpose of extracting gold from the debris in the bed of the stream, is within the provisions of the act of April 23, 1880, for the better protection of the stockholders in such corporations, and the fact that the purpose of the corporation was very feebly prosecuted, and that the work done was without profit, cannot dispense with or excuse the discharge of the duty of the directors to post an itemized account or balance sheet in the office of the corporation, as required by the terms of that act, and, upon their entire failure so to do, they are liable under the statute to a judgment at the suit of a stockholder for the sum of one thousand dollars liquidated damages, as penalty for the violation of that act. (*Ball v. Tolman*, 358.)
2. **INTENTIONAL FAILURE OF DIRECTORS—CASE DISTINGUISHED—IGNORANCE OF LAW.**—The case of *Eyre v. Harmon*, 92 Cal. 530, in reference to the necessity of a willful and intentional violation of the statute by the directors of a mining corporation, has no application where there is an entire failure of the directors to comply with the statute, and no facts of excuse are set forth, or attempted to be proved other than their ignorance of the statute. (*Id.*)
3. **CONSTRUCTION OF STATUTE—PENAL AND REMEDIAL ACT.**—The act of April 23, 1880, for the better protection of stockholders in mining corporations is not only penal in its nature, but it is also reme-

MINES AND MINING (Continued).

dial and of much consequence and value to stockholders, and it must receive a construction with reference to its beneficent objects as well as to its penal character. (Id.)

4. **IMMATERIAL EVIDENCE—BAD FAITH OF PLAINTIFF—DISCHARGE FROM SERVICE—REVENGE—KNOWLEDGE OF ACCOUNTS.**—Evidence of letters of the plaintiff offered for the purpose of showing that the suit was brought in bad faith "solely to get even with defendant for removing him from his berth of assistant superintendent," and not offered for purposes of impeachment of the plaintiff as a witness or to contradict his testimony, was properly excluded as immaterial; nor can the fact that plaintiff, by reason of his connection with the company, had knowledge of the accounts, and had the means of learning about them after his discharge, excuse noncompliance of the directors with the law. (Id.)

MISTAKE. See Contract, 15, 16.

MORTGAGE.

1. **FORECLOSURE OF MORTGAGE—CONDITIONAL LIABILITY OF MORTGAGOR—RELEASE OF PART OF SECURITY FOR LESS THAN VALUE—DEFICIENCY.** The mortgaged premises constitute the primary fund out of which the mortgage debt must be paid, and the liability of the mortgagor is contingent on a sale of the mortgaged premises under foreclosure and an application of the proceeds to the debt and costs, and the deficiency which the code directs may take the form of a personal judgment is a deficiency arising from the sale of all the mortgaged premises, and not a part of it; and if the mortgagee arbitrarily releases portions of the mortgaged premises for less than their actual value, without the consent of the mortgagor, he cannot, on foreclosure, hold the mortgagor liable to a judgment for the apparent deficiency, but must credit the mortgagor with the actual value of the portions released, and if there would have been no deficiency, if the mortgagee had not released any part of his security, he cannot hold the mortgagor for any deficiency. (Woodward v. Brown, 283.)
2. **DEED BY MORTGAGOR—PERSONAL COVENANT AGAINST ENCUMBRANCES—RELEASE TO GRANTEE.**—A covenant against encumbrances, expressed or implied, in a bargain and sale deed by the mortgagor, is a personal covenant, and is not appurtenant to the land nor available to the mortgagee; and a release given to such grantee by the mortgagee, without the consent of the mortgagor, for less than the value of the land released, cannot affect the right of the mortgagor to have the value of such land applied upon the mortgage debt, as respects a deficiency judgment. (Id.)
3. **DECREE OF FORECLOSURE—SALE OF MORTGAGED LOTS IN INVERSE ORDER OF ALIENATION.**—Where portions of the mortgaged premises have been alienated by the mortgagor, the decree of foreclosure must order a sale of the premises, subject to the mortgage, in the inverse order of their alienation. (Id.)

MORTGAGE (Continued).

4. **EFFECT OF PARTIAL RELEASES BY MORTGAGEE—RIGHTS OF PURCHASER OF LOTS NOT RELEASED—NOTICE TO MORTGAGEE.**—The record of conveyances by the mortgagor to purchasers of lots from him, which are not released from the mortgage security, is not constructive notice to the prior mortgagee of such conveyances or of any subsequent conveyances by them to other grantees, and if he has no actual knowledge thereof, he is not prevented thereby from dealing in any manner with the mortgaged premises, and he may release other lots from the mortgage without liability to such purchasers or their grantees, or any impairment of his remaining security upon the mortgaged premises; and the most that can be claimed by them is that the sale should proceed in the proper order of alienation of lots remaining subject to the mortgage. (Id.)
5. **POWER OF PARTIAL RELEASE—REGISTRY—NOTICE.**—A mortgagee has power to give partial releases from the operation of the mortgage of portions of the mortgaged premises, without, in any manner, affecting or discharging his security upon the remainder of the premises; and the registry of such partial releases is sufficient to impart notice to any person dealing with the property, whether noted upon the margin of the record of the mortgage or embodied in separate instruments duly acknowledged and recorded. (Id.)
6. **CONSTRUCTION OF PARTIAL RELEASE—LIMITATION OF GENERAL WORDS OF SATISFACTION.**—A partial release of particular lots from the operation of a mortgage of a larger tract, for a small consideration expressed in the release, will not be construed to operate as an entire satisfaction of the mortgage debt, on account of the use of general words of satisfaction therein, but such words will be construed as limited and not to be extended in effect beyond the evident intention of the mortgagee; nor can purchasers of mortgage lots who took prior to such release be misled by its terms. (Id.)
7. **AGREEMENT FOR RELEASE FROM MORTGAGEE—PRIOR ASSIGNMENT OF MORTGAGE—REGISTRY — NOTICE OF ASSIGNMENT.** — An agreement made with the mortgagee that he would release lots previously sold from the operation of the mortgage, and would hold the purchaser harmless and secure in the title to the lots, made long after the purchase and deed of the lots, and still longer after the assignment of the mortgage to the plaintiff, cannot bind the plaintiff without proof of his knowledge and consent thereto; and the registry of the assignment of the mortgage is part of the record title of which a purchaser from the mortgagor must take notice. (Id.)
8. **CONFLICTING DEEDS—RELEASE FROM MORTGAGE—KNOWLEDGE OF MORTGAGOR—PRIORITY OF DELIVERY—BURDEN OF PROOF—PRESUMPTIONS—CREDIT OF VALUE OF LOTS RELEASED.**—Where a grantee of the mortgagor executed two deeds of the same date to different grantees, one of which conveyed two lots to one grantee, and the other conveyed the same lots and the residue of the mortgaged property to the other grantee, and the mortgagee, with knowledge of both grants, released the two lots to the special grantee thereof, whose deed was first recorded, and his prior right to the lots was

MORTGAGE (Continued).

recognized in the decree of foreclosure of the mortgage, the burden of proof is on the defendants claiming under the other deed to prove its prior delivery, and, in the absence of such proof, it is to be presumed in support of the judgment that the deed first recorded was first delivered; but this presumption does not apply as respects the additional mortgaged property included in the other deed, which must be held to have taken effect as to that property of its date, and prior in time to the special deed of the two lots, which could not be released as against the owners of the other lots, without crediting their full value upon the mortgage debt. (Id.)

9. **APPORTIONMENT OF VALUE OF LOTS RELEASED.**—The value of the lots released cannot be apportioned so as to be credited wholly to a portion of the other lots included in the mortgage which belong to the defendants appealing, but the nonappealing defendants owning the residue of such lots must share in the benefits of the credit. (Id.)
10. **INVERSE ORDER OF ALIENATION—SHERIFF'S DEED—RELATION TO LIEN OF ATTACHMENT.**—In determining the inverse order of alienation of mortgaged lots sold by the mortgagor, a sheriff's deed must be deemed to relate to the lien of an attachment upon the lots sold; and it is error to order such lots sold under the decree of foreclosure prior to lots conveyed intermediate the attachment and the sheriff's deed. (Id.)
11. **LOT CONVEYED TO PERSON NOT A PARTY.**—It is error to order a mortgaged lot to be sold under the decree of foreclosure, which prior to the commencement of the action had been sold and conveyed to a person not a party to the suit, unless it is made to appear that prior thereto such person had sold it to a person who was made a defendant. (Id.)
12. **IMPROPER ORDER OF SALES—LANDS OF PARTY NOT APPEALING—RIGHTS OF APPELLANTS.**—A party not appealing cannot complain of the order in which the sale of mortgaged lots is to be made; but the sale of the lands of such party which remain subject to the mortgage must, with reference to other defendants appealing, be made with a due regard for their equities. (Id.)
13. **RIGHT OF PLAINTIFF TO SUE—FINDING—EVIDENCE—ASSIGNMENTS—RECITALS.**—A finding that plaintiff was the owner and holder of the notes and mortgage when the action was brought substantially finds on the issue raised by the answer that plaintiff was not the real party in interest and had no right to prosecute the action, and the finding is sufficiently sustained by evidence of an assignment made to plaintiff, though he was at the time acting for a bank of which he was president, and testimony by him that he finally bought them outright; and his title as owner and holder cannot be defeated by recitals in a subsequent assignment from the assignor to another assignee to the effect that the notes and mortgage were held by plaintiff and the bank as security for indebtedness to them. (Id.)

MORTGAGE (Continued).

14. **RIGHT OF COLLECTION—IMMATERIAL EVIDENCE—AMOUNT PAID FOR ASSIGNMENT—TIME OF ACQUISITION OF TITLE.**—For the purpose of bringing the action, it would be sufficient if plaintiff held an assignment of the notes and mortgage merely for collection, and questions put to him as to the amount paid by him for the mortgage, and whether there was anything owing to the bank of which he had been president, of which he testified that he bought the mortgage, and as to when he acquired the absolute title, were properly disallowed as immaterial. (Id.)
15. **NOTES PAYABLE AT DIFFERENT TIMES—OPTION AS TO MATURITY—BRINGING OF ACTION—APPLICATION OF PAYMENTS — IMMATERIAL APPLICATION TO LAST NOTE.**—The bringing of an action upon a note not mature upon its face operates as an exercise of an option given in the note to regard it as due for nonpayment of interest thereon; and where three notes were given, payable at different times, and the first was paid in full at maturity, and the second was past due when suit was brought thereon, and the last was payable *in futuro*, but subject to the option to regard it as due for nonpayment of interest, and each bore the same rate of interest, the fact that some of the payments received by the plaintiff were applied upon the third note instead of the second is immaterial, it appearing that, if all the payments made after payment of the first note had been indorsed upon the second note, there would still be an unpaid balance on the second note and unpaid interest on both notes when the action was brought. (Id.)
16. **ALLOWANCE OF ATTORNEY'S FEES.**—Where the mortgage provides for a reasonable counsel fee to be fixed by the court in case of foreclosure, the duty of fixing the amount of compensation is cast upon the court, and no evidence of value of the services is necessary. (Id.)
17. **DECREE OF FORECLOSURE—EXECUTION SALE OF DECREE INVALID.**—A judgment and decree foreclosing a mortgage cannot be levied upon and sold under execution, and an execution sale thereof is invalid and ineffectual to transfer such judgment and decree to the purchaser, who takes nothing thereby. (Carpenter v. Lewis, 18.)
18. **MORTGAGE BY DEED ABSOLUTE—IMPROPER RECORD OF DEFEASANCE—PROTECTION OF BONA FIDE PURCHASER.**—Where a mortgage was made by deed absolute upon its face, and a defeasance executed by the grantee was not acknowledged by the grantee, but was merely acknowledged and recorded by the grantor, a bona fide purchaser from the mortgagee for value, without actual notice of the defeasance, or of the fact that the deed was intended as a mortgage, is protected under the provisions of sections 2925 and 2950 of the Civil Code, and became the real owner of the lot. (Id.)
19. **ENTRY OF DECREE OF FORECLOSURE—ABSENCE OF NOTICE OF LIS PENDENS—CONSTRUCTIVE NOTICE.**—The pendency of an action for the foreclosure of a mortgage by deed absolute is not constructive notice to a bona fide purchaser from the mortgagee, where no notice of *lis pendens* appears of record; nor is such purchaser bound

MORTGAGE (Continued).

to take constructive notice of the mere entry of a decree of foreclosure in such action where there is no sale or docketing of the judgment therein. (Id.)

20. **FORECLOSURE OF MORTGAGE—ESTATE OF DECEASED PERSON—PARTIES—ADMINISTRATRIX—HEIRS—WRIT OF ASSISTANCE TO PURCHASER.**—In an action to foreclose a mortgage executed by a deceased person, it is sufficient to make the administratrix of his estate a party defendant, and the heirs of the mortgagor are not necessary parties to the action, nor is it necessary that the administratrix should be sued individually in order to bar her right of succession to the mortgaged premises; and the purchaser at the foreclosure sale, after receiving his deed, is entitled to a writ of assistance against the administratrix for possession of the premises, where her answer to the application for the writ fails to show that she claims the property or the possession thereof by any right or title adverse to that of her deceased husband, whose right was foreclosed in the action to which she as administratrix was a party. (*Finger v. McCaughey*, 59.)
21. **FORECLOSURE OF MORTGAGE—SUBORDINATE LIENS—SALE OF PARCELS BY MORTGAGOR—ORDER OF SALE SUBJECT TO JUST RIGHTS.**—The entire rule established by section 299 of the Civil Code, respecting the order of sale of the mortgaged premises, in case of transfer of parcels thereof, and of subordinate liens not coextensive with the mortgage, applies, under the terms of the statute, only where it can be followed without injustice to other persons. (*Irvine v. Perry*, 352.)
22. **SALE IN INVERSE ORDER—ASSUMPTION OF MORTGAGE DEBT BY GRANTEE.**—The doctrine of selling mortgaged property, which has been alienated by the mortgagor, in the inverse order of alienation, is not unyielding; and where, upon a sale of part of the premises, the grantee has bound himself to pay the mortgage debt, or a proportionate part thereof, the portion purchased by him becomes in his hands and in the hands of those holding under him with notice, primarily chargeable with the mortgage debt, or such proportionate part thereof as he may have agreed to pay, as against the mortgagor, and as against subsequent purchasers of other parcels of the mortgaged premises. (Id.)
23. **COSTS—DISCRETION—APPEAL.**—The costs in an action of foreclosure are in the discretion of the court, and, where the evidence is not returned upon appeal, it cannot be said that there was an abuse of discretion. (Id.)
24. **ATTORNEY'S FEES—STIPULATION—LIMITATION OF MORTGAGE SECURITY.**—Where the mortgage purports only to secure the payment of a promissory note, and does not purport to secure the payment of attorney's fees, a stipulation in the mortgage for counsel fees at the rate of ten per cent upon the amount due, does not authorize the making of such fees a lien upon the property or the inclusion of them in the decree of sale. (Id.)

MORTGAGE (Continued).

25. **FORECLOSURE OF MORTGAGE—EVIDENCE—MORTGAGE NOT PROPERLY RECORDED—GENERAL OBJECTION OF ADVERSE CLAIMANT—FAILURE TO EXCEPT—WAIVER.**—In an action to foreclose a mortgage, which is not properly recorded, the mortgage is admissible in evidence as against the mortgagor; and it is incumbent upon one claiming adversely to the mortgage, who objects to its admission in evidence, to point out specifically the ground of objection thereto; and where the objection interposed by the adverse claimant was a mere general objection to the mortgage as irrelevant, immaterial, and incompetent, without pointing out wherein it was such as against the objector, and no exception was taken to the ruling admitting the mortgage in evidence, all objection thereto by such adverse claimant is waived. (*Lee v. Murphy*, 364.)
26. **VOID ACKNOWLEDGMENT OF MORTGAGE—MORTGAGEE ACTING AS NOTARY — PRESUMPTION OF IDENTITY—RECORD NOT CONSTRUCTIVE NOTICE.**—An acknowledgment of a mortgage made before a notary public bearing the same identical name with that of the mortgagee, and made in the county of the residence of both parties, must be presumed, from the identity of name, to have been taken before the mortgagee as a notary public, in the absence of proof to the contrary; and an acknowledgment so taken is void, and does not authorize any record of the mortgage, and the record thereof does not impart constructive notice to third parties of the rights of the mortgagee. (*Id.*)
27. **HOMESTEAD CLAIM BY WIFE OF MORTGAGOR—PRIORITY TO UNRECORDED MORTGAGE—ACTUAL NOTICE IMMATERIAL.**—The rights of a homestead claimant are statutory, and are not subject to the application of the general principles of equity respecting actual notice to purchasers, nor is the homestead subject to forced sale under a mortgage, unless it was properly executed and recorded before the declaration of homestead was filed for record; and where the record of the mortgage was unauthorized and void, it must be treated as though not recorded, and a subsequent homestead claim filed by the wife of the mortgagor has validity and priority over the mortgage, notwithstanding she had actual notice of the mortgage. (*Id.*)
28. **MORTGAGE FOR PURCHASE MONEY—VENDOR'S LIEN—WAIVER—EXEMPTION OF HOMESTEAD.**—Although the homestead is not exempt from forced sale as against a vendor's lien upon the homestead, yet where a mortgage is taken for the purchase money, the vendor's lien is thereby waived, and the homestead is exempt from execution, as against any mortgage upon the premises which was not recorded before the declaration of homestead was filed, notwithstanding such mortgage may have been given for the purchase money. (*Id.*)
29. **EQUITABLE LIEN FOR PURCHASE MONEY—MAXIM.**—Under section 1241 of the Civil Code an equitable lien for purchase money, as distinguished from a vendor's lien, is not chargeable upon the homestead. (*Id.*)
30. **CONFLICT AND PRIORITY—PRIOR RECORDATION OF SECOND MORTGAGE—ACTUAL NOTICE—UNPROTECTED TRANSFER.**—The prior recordation of a second mortgage does not give it priority over a

MORTGAGE (Continued).

first mortgage which is subsequently recorded, where the mortgagee named in the second mortgage had actual notice of the execution and existence of the prior note and mortgage when the second mortgage was executed, while such mortgage remains in the hands of the mortgagee, or of his assignee, who takes without consideration, or subsequently to the record of the first mortgage. (County Bank of San Luis Obispo v. Fox, 61.)

31. **FORECLOSURE—CONFLICTING MORTGAGES—PLEADING—PROTECTION OF BONA FIDE ASSIGNEE OF SECOND MORTGAGE.**—In a foreclosure suit, where there is a conflict as to priority of lien between an assignee of such second mortgage and the prior mortgagee, and it appears that the subsequent mortgagee, whose mortgage was first recorded, had actual notice of the prior mortgage, it devolves upon such assignee, in order to claim protection as a *bona fide* purchaser of the second mortgage for value, without notice of the prior mortgage, to plead and prove the facts essential to make him such *bona fide* purchaser, and to show that he took for value prior to the recordation of the first mortgage, and without actual notice thereof. (Id.)
32. **CONSTRUCTIVE NOTICE TO ASSIGNEE.**—Where the court finds that the second mortgagee had actual notice of the prior mortgage, and there is neither allegation nor finding that any consideration was paid for the assignment of the second mortgage, and it does not appear but that it may have been made after recordation of the first mortgage, the assignee of the second mortgage will be deemed chargeable with constructive notice of the prior mortgage, and a decree giving priority of lien to the first mortgage will be affirmed. (Id.)
33. **FORECLOSURE OF MORTGAGE—CONVEYANCE—DEFENSE—CLAIM OF OWNERSHIP BY MORTGAGEE—REFUSAL TO ACCEPT OFFER OF PAYMENT—BURDEN OF PROOF—FINDING—CONFLICT OF EVIDENCE.**—In an action to foreclose a mortgage, made in the form of a conveyance to secure a note of the defendant, where the defendant pleaded as a defense that after the maturity of the note he applied to the plaintiff to ascertain the amount due thereon, for the purpose of paying the same, and having the property discharged from the lien of the mortgage, and that upon such application the plaintiff claimed to be the owner of the property, and refused to entertain any offer from the defendant to pay off and discharge the mortgage, the burden is upon the defendant to establish such defense to the satisfaction of the court by a preponderance of evidence, and where the evidence is conflicting as to what occurred between the parties, and the court finds that the plaintiff did not make the claim and refusal alleged, a judgment for the plaintiff will not be disturbed upon appeal. (Fisk v. Casey, 643.)
34. **ARGUMENTATIVE PLEADING — OFFER OF PAYMENT.**—The answer should not allege an offer of payment argumentatively by a mere allegation of refusal, but it is incumbent on the defendant, if he would claim that the plaintiff was not entitled to interest after such offer and refusal, to allege such defense with definiteness, and to prove that it is well founded. (Id.)

MORTGAGE (Continued).

35. **FINDING NOT CONTROLLED BY ORAL DECLARATION OF JUDGE—AFFIDAVITS NOT PERMISSIBLE TO IMPEACH FINDING.**—The finding of the court that plaintiff did not claim to be the owner of the property, and did not refuse to entertain any offer from the defendant to pay off and discharge the mortgage, is not controlled by an oral declaration of the judge, made at the time of announcing the decision for the plaintiff, that he believed the testimony of defendant's witnesses concerning the interview; nor can the finding of the court be impeached by affidavits of what occurred when the decision was announced. (Id.)
36. **AMENDMENT OF ANSWER—INSUFFICIENT DEFENSE—PAROL AGREEMENT TO PAY TAXES ON MORTGAGE—EVIDENCE—VARIANCE OF WRITTEN AGREEMENT FOR INTEREST.**—The court may properly refuse to allow an amendment to the answer which sets forth an insufficient defense, by alleging that at the time when the promissory note was made, which was secured by the conveyance of the defendant's land to the plaintiff, it was orally agreed between them that defendant should pay all taxes assessed on the land, including the taxes on the mortgage, the object of evidence of such parol agreement being to vary and destroy the written agreement for interest contained in the note, which could not be varied by proof of the averment of such parol agreement; and it is immaterial that the mortgage existed by virtue of a parol agreement that the deed should be given as security for the debt. (Id.)
37. **EVIDENCE—WILLINGNESS TO PAY NOTE.**—The court properly refused to allow the defendant to testify that he was willing to pay the note or that he communicated such willingness to the plaintiff. (Id.)
38. **MORTGAGE BY DEED ABSOLUTE—ADVERSE POSSESSION OF MORTGAGEE—PRESCRIPTIVE TITLE.**—The fact that a mortgagor cannot maintain ejectment against his mortgagee in possession until the mortgage debt is paid does not preclude the mortgagee from acquiring a prescriptive title by adverse possession; and where the mortgage was in the form of a deed absolute on its face, and it appears that subsequent to conditions broken there was a hostile possession of the mortgagee under claim of title to the knowledge of the mortgagor, for more than five years, a prescriptive title is acquired by the mortgagee, and all remedy of the mortgagor, and of those claiming under him, is lost by limitation. (*Peshine v. Ord*, 311.)
39. **QUIETING TITLE AGAINST MORTGAGEE—MAXIM—CONDITION OF ACTION—STATUTE OF LIMITATIONS—LOSS OF REMEDY.**—A mortgagor, or his successor in interest, who seeks to quiet title against the mortgagee in possession, is bound by the maxim that he who seeks equity must do equity, and must pay the mortgage as a condition of success in the suit; but if the mortgagee in such a case denies that there is any equity to be done by the mortgagor, and has asserted title in himself, the mortgagor or those claiming under him must proceed against the mortgagee within five years after an adverse claim of title has been made manifest, or lose all remedy, whether the debt or obligation secured by the mortgage has been paid or not. (Id.)

MORTGAGE (Continued).

40. **DIVESTITURE OF TITLE OF MORTGAGOR—DECREE OF DIVORCE—SUBSEQUENT ACTS OF MORTGAGOR NOT BINDING—ADVERSE CLAIM.**—Where the title of the mortgagor has been divested by a decree of divorce, his subsequent acts are those of a stranger to the premises, and cannot defeat any rights acquired under the decree; and an agreement made in a subsequent action brought by the mortgagor against the mortgagee in possession, by the terms of which the mortgagor agreed that the mortgagee was the owner of the premises covered by the decree of divorce, cannot defeat the rights acquired under that decree, though such agreement may serve to manifest an adverse claim to the premises by the mortgagee, and to show that no redemption was contemplated between the parties to the agreement. (Id.)

See Agency; Attachment, 2; Guaranty, 1, 4; Specific Performance, 3.

MUNICIPAL CORPORATIONS.

1. **LIGHTING STREETS — LETTING CONTRACT — DEMAND ON CITY COUNCIL.** — The city council or boards of trustees of municipalities are charged with notice of the act of March 26, 1895, requiring the letting of contracts for lighting public streets, and it is not necessary for a party seeking to compel them to comply with the requirements of that act to embody in his formal demand all its provisions or to specifically point out the steps demanded to be taken. It is sufficient, so far as the demand is concerned, to make it upon the council. (Santa Rosa Lighting Co. v. Woodward, 30.)
2. **DISCRETION AS TO LIGHTING STREETS—MANDAMUS TO COMPEL ADVERTISEMENT FOR BIDS.**—The courts will not compel a city council to exercise its discretion as to whether the streets of its municipality should or should not be lighted; but where its past and present official conduct unmistakably show that it has determined that the city should be lighted by electricity, and there is no valid binding contract standing in the way of proceeding under the act of 1895, a writ of mandate will lie at the instance of a taxpayer to compel it to advertise for bids for such lighting, as required by that act, without any showing by him of actual pecuniary damage. It will be presumed that the disregard by the council of the requirements of the statute is injurious. (Id.)
3. **ACTION UPON BOND OF COUNTY TREASURER—AUTHORITY OF DISTRICT ATTORNEY—RECOVERY OF MONEY PAID UPON ILLEGAL CLAIMS—CONSTRUCTION OF COUNTY GOVERNMENT ACT.**—Section 8 of the County Government Act, authorizing the district attorney to institute a suit in the name of the county, without an order of the board of supervisors, to recover money illegally paid to any person or persons, contemplates an action brought against the recipient of funds illegally paid, and has no application to an action brought upon the bond of the county treasurer for the improper payment of illegal claims, and the district attorney has no authority to bring such

MUNICIPAL CORPORATIONS (Continued).

action, unless ordered to do so by the board of supervisors. (*Ventura County v. Clay*, 213.)

4. **DISMISSAL OF ACTION — LACK OF AUTHORITY OF DISTRICT ATTORNEY.**—A motion to dismiss an action brought by the district attorney is proper procedure, when the action is brought by him without authority. (*Id.*)
5. **RENEWAL OF MOTION—DISCRETION.**—Where the superior court is led to believe that it has fallen into error in refusing a motion to dismiss an action brought by the district attorney without authority, it is not an abuse of discretion to permit a renewal of the motion, and to decide it in accordance with views expressed by the appellate tribunal. (*Id.*)
6. **LIABILITY LIMITED TO REVENUE OF YEAR'S INDEBTEDNESS — CONSTITUTIONAL LAW.** — Under section 18 of article XI of the constitution, each year's income and revenue of a municipal corporation must pay each year's indebtedness and liability, and no indebtedness or liability incurred in any one year can be paid out of the income or revenue of any future year. (*Montague v. English*, 225.)
7. **CONTRACT FOR SALE OF WATERPIPE—DELIVERY — EXHAUSTION OF YEAR'S REVENUE—VALIDITY OF CONTRACT—REMEDY ONLY AFFECTED.**—A contract for the sale of waterpipe to be imbedded in the streets of a city for its use and benefit, in connection with waterworks established under vote of its electors, which was entered into and carried out by the delivery and laying of pipe thereunder, during one fiscal year, and at a time when there was money in a water fund derived from the sale of bonds for the improvement, sufficient to meet the obligation, was valid, and its validity could not be affected by any subsequent failure of revenues from that fund, or from the general fund of that fiscal year; but the seller was bound to look only to the revenues of the city for that fiscal year for payment, and the exhaustion of such revenues affected only his remedy and left him in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim. (*Id.*)
8. **TITLE TO WATER PIPE—INVALID PURCHASE IN SUBSEQUENT YEAR—VOID WARRANT—MANDAMUS.**—The title to the waterpipe laid in the streets of the city, under such contract, during one fiscal year, vested in the city, and a subsequent attempt of the city to purchase a part thereof during the next fiscal year, was invalid and void, and a warrant issued under such purchase drawn upon the funds of a subsequent year was without consideration and void, and its payment could not be compelled by *mandamus* to the city treasurer. (*Id.*)
9. **MUNICIPAL CHARTER OF SACRAMENTO — POWER OF BOARD OF TRUSTEES — TRIAL OF CHARGES AGAINST SUPERINTENDENT OF STREETS—JURISDICTION — SUFFICIENCY OF CHARGES — PROHIBITION.** — Under the municipal charter of the city of Sacramento, the board of trustees has jurisdiction to try the superintendent of streets upon charges of incompetency, neglect of official duty, and being interested in contracts payable from the city treasury, in violation of the charter, and to remove him from office, if found guilty

MUNICIPAL CORPORATIONS (Continued).

thereof; and the question of the sufficiency of the charges in form must be made to the board having the authority to determine them, and cannot be considered upon application for a writ of prohibition, nor will such writ lie to prevent a trial of the charges, where none of them is based upon a violation of the general laws of the state, and the subject matter of the charges is within the class of matters that the board is authorized to try. (*Croly v. Board of Trustees*, 229.)

10. **CONSTITUTIONAL LAW — EXERCISE OF JUDICIAL POWER — MUNICIPAL AUTHORITY.**—The charter of the city of Sacramento is not unconstitutional as conferring the exercise of a judicial power upon the board of trustees to try a municipal officer thereunder; but the appointment and removal of a city superintendent of streets is a matter purely municipal, which, under the constitutional power to frame a city charter, may be conferred upon the municipal body, and is rather the exercise of a power necessary for its police and good administration than the exercise of judicial powers by a legislative body. (*Id.*)
11. **COMMON LAW POWER OF AMOTION OF OFFICERS.** — It seems that there is a common-law power of amotion of officers as an incident to all corporations, though not conferred by statute; but the question is undecided, and is referred to as showing that a charter provision authorizing such amotion is not to be considered as unprecedented, or held unconstitutional or inoperative unless upon clearly sufficient grounds. (*Id.*)
12. **DOUBLE PENALTY — REMOVAL AND DISQUALIFICATION — QUESTION UNDETERMINED.**—The board of trustees of Sacramento having power and jurisdiction under its city charter to remove the superintendent of streets from office for sufficient cause shown, as provided therein, prohibition will not lie to restrain their action, regardless of the question whether the power conferred by the charter upon them to perpetually disqualify him from holding office under the municipality is or is not invalid; and such question is left undetermined until properly raised, upon the rendition of a judgment of disqualification by the board of trustees. (*Id.*)
13. **BONDS FOR MUNICIPAL IMPROVEMENTS—CONSTRUCTION OF STATUTE —ELECTION OF MUNICIPALITY AS TO GOLD COIN.**—Under the terms of the original act of March 19, 1889, providing for the issuance and sale of bonds of a city to pay the cost of municipal improvements authorized by the voters, the municipality was not required to designate the kind of money in which the bonds should be payable, and, in the absence of such designation, could at maturity elect to pay them in any lawful money; and the purpose of the legislature in the amendment of 1893, providing that such bonds "shall be payable in gold coin or lawful money of the United States," was not to require that the bonds should express that alternative, but to confer the power of election upon the municipality to make the bonds payable in gold coin only. (*Murphy v. San Luis Obispo*, 624.)

MUNICIPAL CORPORATIONS (Continued).

14. **MODE OF HOLDING ELECTION—PROVISIONS OF ORDINANCE—MANDATORY REQUIREMENT—INVALID ELECTION.**—An ordinance of a city designating the mode of holding an election for the issuance of bonds for municipal improvements, having been passed by virtue of the statute authorizing it, has the force of a statute, and is to be construed with the same effect as if its terms had been prescribed by an act of the legislature; and where the ordinance provides that "each voter shall indicate his wish by writing or causing to be written or printed 'yes' or 'no' on the right-hand margin on his ticket opposite the proposition on which he may desire to vote," such requirement is mandatory, and a disregard of it renders the vote nugatory; and where the ballots contained an improper notice printed upon them, "to vote for or against a proposition, place an 'X' in the square at the right," and more than two-thirds of the voters followed such direction, instead of following the direction given in the ordinance, the election is invalid. (Id.)
15. **ALTERNATIVE OF MAKING INTEREST PAYABLE ANNUALLY OR SEMI-ANNUALLY—SUBMISSION TO VOTERS.**—It was not necessary to submit to the voters the alternative of making the interest on the proposed bonds payable annually or semi-annually, but it is sufficient that the ordinance states the times at which the interest shall be payable; and it is only the amount of the bonds and the rate of interest which constitute the indebtedness proposed to be incurred, and upon which the voters are to express their wishes. (Id.)
16. **DELINQUENT TAX LIST — AUTHORITY FOR PUBLICATION — ALLOWANCE OF ILLEGAL CLAIM BY SUPERVISORS — MANDAMUS TO AUDITOR.** The tax collector has no authority to contract for the publication of the delinquent tax list, and where the board of supervisors of the county did not contract for the publication thereof with the lowest bidder after ten days' public notice, in pursuance of section 3766 of the Political Code, such board had no authority to allow and approve a claim for the publication thereof by order of the tax collector, and *mandamus* will not lie to the auditor to compel the drawing of a warrant for such illegal claim. (Harris v. Cook, 454.)
17. **PROCEEDINGS TO SELL TELEPHONE FRANCHISE—ABATEMENT — REPEAL OF ACT — SUBSTITUTION OF NEW ACT.** — Proceedings had for the sale of a telephone franchise by a city council under the act of March 23, 1893, could not be carried to a conclusion after the repeal of that act, and the taking effect of the act of May 12, 1897, which supersedes it; but any proceedings had under the former act became *functus officio* after May 11, 1897, and could not be perfected or completed under the act of 1897. (Horton v. Los Angeles, 602.)
18. **INJUNCTION TO RESTRAIN SALE — DISSOLUTION — APPEAL AFTER TAKING EFFECT OF NEW ACT—PRESUMPTION—DISMISSAL.** — Where an injunction to restrain a sale of a telephone franchise under the act of 1893, was dissolved May 10, 1897, the dissolution left the city council free to act, and, when no appeal was taken until nearly two months after that act had ceased to be a law, it must be presumed that if the council proceeded after May 11, 1897, it

MUNICIPAL CORPORATIONS (Continued).

proceeded under the new act, and as, in any event, the restoration of the injunction would avail nothing, the appeal from the order dissolving the injunction should be dismissed without prejudice. (Id.)

See County; Eminent Domain; Injunction, 2, 3; Irrigation District; Judgment, 2.

MUTUAL BENEFIT SOCIETY.

1. **BENEVOLENT SOCIETY — EXPULSION OF MEMBER — USE OF OPPROBRIOUS LANGUAGE — INTERFERENCE BY COURT.** — Where the constitution of a benevolent society provides that one of its objects is the propagation of unity, friendship, and brotherly love among its members, and gives the society the right to expel a member who violates any of the principles of the society or offends against the constitution, the question whether opprobrious language used by a member toward his fellows is a violation of its constitution or principles is for the society to determine, and its action in expelling a member therefor, after due notice and a fair trial, will not be interfered with by the courts. (*Josich v. Austrian Ben. Soc. of San Jose*, 74.)
2. **PROPERTY RIGHTS OF MEMBER.**—The interest which a member has in the property of such a society is only incidental to his membership, and will cease upon his ceasing to be a member. If he has forfeited his right of membership by reason of his conduct, this interest in the property will not prevent his expulsion, or give to courts the right to prevent an investigation of the charge, or to determine its sufficiency. (Id.)

NEGLIGENCE.

1. **FALL OF ELEVATOR — EVIDENCE — DECLARATIONS OF PERSON IN CHARGE — RES GESTAE — NARRATIVE OF PAST OCCURRENCE—PREJUDICIAL ERROR—ESTOPPEL OF PLAINTIFF—APPEAL.**—In an action for an injury received from the fall of an elevator, owing to the alleged negligence of the defendant, evidence of a conversation had by plaintiff with the person in charge of the elevator after it had stopped in its fall, in which in response to a question as to what had happened he declared that "he lost all control, and the connection cord got broke," is incompetent, the declaration being in its nature a narrative of a past occurrence, and no part of the *res gestae*, and such incompetent evidence, being of a character to charge the defendant with negligence, must be deemed prejudicial; nor can the plaintiff, after insisting upon the admission of the evidence over an objection to its admissibility, be permitted to defend his course by contending, upon appeal of the defendant, that the error was harmless. (*Lissak v. Crocker Estate Co.*, 442.)
2. **TESTIMONY OF PHYSICIAN—WAIVER OF OBJECTION—IMPLIED CONSENT OF PATIENT—ERRONEOUS ORDER STRIKING OUT.** — Where the plaintiff had testified that, after the fall of the elevator he was taken to the office of a physician, and gave testimony respecting

NEGLIGENCE (Continued).

the examination and treatment given him by such physician, and the physician was called for the defense and testified, without objection of plaintiff, respecting his examination of plaintiff and the remedies used, and the nature of his injuries, the failure of plaintiff to object thereto was a waiver of objection, and an implied consent to the evidence, which could not be revoked, and it was error for the court, upon plaintiff's objection to further evidence of the witness, upon the ground that he was disqualified, to strike out the evidence previously given by the physician, and to instruct the jury to disregard it. (Id.)

3. **CORRESPONDING DUTY — INJURY TO PLAINTIFF — NONLIABILITY OF DEFENDANTS—NONSUIT.**—There can be no negligence, without the existence of a corresponding duty upon the part of the persons against whom the negligence is charged; and there can be no liability of defendants for an injury to the plaintiff where, under the circumstances shown, it is clear that defendants were under no legal duty or obligation to protect plaintiff from the injury he received; and, where the evidence for the plaintiff discloses that no such duty existed, the plaintiff is properly nonsuited for want of proof of negligence of the defendants. (*Kennedy v. Chase*, 637.)
4. **MASTER AND SERVANT — SAFE PLACE FOR WORK—EXTENT OF DUTY OF MASTER—PRIVATE EXCURSION OF SERVANT.**—The duty of a master to furnish his servant with a reasonably safe place in which to work is limited to the premises where the employee is required to be for the purposes of his employment, and does not extend to his protection while upon private excursions outside of those limits, taken solely upon his own account. (Id.)
5. **EMPLOYMENT OF SERVANT UPON LIGHTER—PRIVATE EXCURSION TO VESSEL—INJURY IN HATCHWAY—NONLIABILITY OF MASTER.**—Where the servant's place of employment was upon a lighter, from which a vessel was being loaded, and his work consisted in shoveling ballast from the deck of the lighter onto a staging erected outside of the vessel, and the servant made a private excursion upon the deck of the vessel, upon his own account and for his own convenience, to place his coat upon a main hatchway unnecessarily remote from the place of his employment, and, upon resuming his coat after quitting work, fell into a smaller hatchway on the deck which was outside the limits of his employment, and was injured by the fall, the master owed no duty to protect him against such injury, and cannot be held liable therefor. (Id.)

VOLUNTARY ENTRY UPON VESSEL OUT OF SCOPE OF EMPLOYMENT — LICENSEE AT SUFFERANCE—NONLIABILITY OF OWNERS OF VESSEL.—The plaintiff, in going about upon the vessel without the permission or invitation of the owners or master thereof, and outside the scope of his employment in loading the vessel was a mere licensee at sufferance, and the owners of the vessel owed no duty to protect him against injury in a part of the vessel where he was neither invited nor expected to go; but the extent of the liability assumed by the owners of the vessel was that their decks should be reasonably

NEGLIGENCE (Continued).

safe where the plaintiff was required by his employment to traverse, them, and not elsewhere. (Id.)

NEWSPAPER. See Contempt.**NEW TRIAL.**

1. **NEWLY DISCOVERED EVIDENCE—LACK OF DILIGENCE.**—A new trial will not be granted for newly-discovered evidence, where it appears that what the witness could have testified to was well known to the defendant before the trial, and no steps were taken to secure his attendance at the trial, and the lack of diligence in that regard was such that the defendant, though stating to the court a desire for his evidence, did not insist upon a postponement to secure it. (People v. Luchette, 501.)
2. **MOTION FOR NEW TRIAL — EXPURGATED AFFIDAVIT — HARMLESS—RULING.**—An order striking out an affidavit on motion for new trial is harmless where the matters contained in it were mainly recitals of what appeared in the record, and it was not in support of the ground of newly-discovered evidence, and was more in the nature of an argument on the motion than the presentation of any new fact of which the court could take notice. (Woodward v. Brown, 283.)

See Agency, 2; Appeal, 8, 10; Criminal Law, 45; Divorce, 7.

NOTARY PUBLIC. See Mortgage, 26.**NOTICE. See Mortgage, 4, 5, 7, 18, 19, 20, 27, 30, 32.****NUISANCE. See Injunction, 2, 3.****ORDINANCE. See County.****PARENT AND CHILD.**

1. **CONTRACT BETWEEN DIVORCED PARENTS—CUSTODY OF DAUGHTER BY FATHER—RETURN TO MOTHER AT MAJORITY—LIQUIDATED DAMAGES—VOID STIPULATION.** — A contract entered into between divorced parents by the terms of which the custody of a minor daughter, which had been awarded to the mother, was transferred to the father, who agreed to bear the expenses of her support and education until she reached the age of eighteen, and then to return her to her mother, and, in case of violation of any provision of the contract by him, agreed to restore the daughter to her mother free of expense, and for any failure to do so to become liable to the mother in the sum of one thousand dollars as liquidated damages, if construed as importing anything more than an agreement to allow and afford facilities to the daughter to return to the mother at the age of majority, if she chose to do so, and as imposing an unconditional obligation to return her to her mother at the age of eighteen at all events, is to that extent void, and the stipulated damages cannot be recovered for its breach. (Dittrich v. Gobey, 599.)

PARENT AND CHILD (Continued).

2. **STIPULATION INFRINGING PERSONAL LIBERTY.** — The right of freedom from personal constraint is perfect at the age of majority, and no parent has a right to the custody of a child thereafter; and a stipulation to restore a daughter to the custody of a mother at the age of eighteen, *nolens volens*, is as much a contract to infringe the personal liberty of the daughter as if the period fixed had been twice or thrice that age, and is unlawful. (Id.)
3. **CONTRACT NOT ALTERNATIVE.**—A contract in the alternative when not in terms providing otherwise, allows the right of election to the party on whom rests the obligation of performance; and there being nothing in the language of the agreement indicative of a purpose to allow the father to choose whether he would restore the child or pay a pecuniary mulct instead, and no option to pay the penalty and be rid of the obligation to return the custody of the daughter being permitted by the terms of the agreement, the contract cannot be considered as an alternative one to return the child at her majority to her mother, or to pay her one thousand dollars. (Id.)

See Criminal Law, 1, 2.

PARTIES. See Church, 1; Mortgage, 20.

PARTITION. See Trust, 12.

PARTNERSHIP. See Receiver

PAYMENT. See Mortgage, 15, 33, 34; Sale, 9.

PLACE OF TRIAL.

ACTION FOR PARTNERSHIP ACCOUNTING—VENUE—CHANGE OF PLACE OF TRIAL—NONRESIDENT DEFENDANTS. — An action, the purpose of which is to have it adjudged that the plaintiff is the owner of an undivided interest in all the property, business, proceeds, and profits of an alleged copartnership, and for an accounting thereof, must be tried in the county in which the defendants, or some of them, reside at its commencement; and it is only where none of the defendants are residents of the state that the action may be tried in any county which the plaintiff may designate in the complaint; but when a portion of the defendants are nonresidents, and the remainder are residents of the state, only those who are residents of the state need join in a demand to change the place of trial; and the fact that nonresidents, who cannot move for a change of venue, unite in demanding such change, cannot deprive the other defendants of the right to make the demand, and to have the case tried in the county of the residence in which the defendants, or some of them, resided, when the action was commenced. (*Banta v. Wink*, 78.)

See Criminal Law, 3.

PLEADING.

1. **ACTION FOR MONEY UPON CONTRACT—INSUFFICIENCY OF COMPLAINT—FAILURE TO AVER NONPAYMENT.**—In an action upon contract to

PLEADING (Continued).

recover money, the breach of the contract to pay is of the essence of the cause of action, and must be alleged; and a complaint which does not allege that the debts sued upon have not been paid fails to state a cause of action, and a demurrer thereto upon that ground should be sustained. (*Hurley v. Ryan*, 71.)

2. **DEMURRER NOT WAIVED.**—A demurrer for insufficiency of the complaint to state a cause of action is not waived by answer, whether filed at the same time or subsequently, nor is such defect in the complaint cured by verdict. (*Id.*)

See Attachment, 6, 7; Contract, 5, 6; Divorce, 1; Estate of Deceased Persons, 25, 26; Fraud, 1; Guaranty, 2; Guardian and Ward, 2; Jurisdiction; Mortgage, 33-36; Quieting Title, 1, 3; Statute of Limitations, 1.

PLEDGE. See Agency.

POSSESSION. See Claim and Delivery.

PRACTICE.

1. **DISMISSAL OF ACTION—WANT OF PROSECUTION—DELAY IN SERVICE OF SUMMONS—DISCRETION—CONSTRUCTION OF CODE.**—Subdivision 7 of section 581 of the Code of Civil Procedure, providing that no actions shall be further prosecuted, and all actions shall be dismissed unless summons shall have been issued within one year and shall have been served within three years after the commencement of the action, is not to be construed as meaning that plaintiff may have the full time limited thereby in all cases; but it is still discretionary with the court, as it was prior to the amendment of that section, to dismiss the action for improper delay in the prosecution of it, even though the summons be issued and served within the time limited by the code. (*Stanley v. Gillen*, 176.)
2. **RULE NOT FIXED OR CERTAIN—QUESTION AS TO ABUSE OF DISCRETION.**—There is no fixed or certain rule as to the dismissal of an action for want of prosecution in cases in which the dismissal is not made compulsory by the Code of Civil Procedure; and where there is no dispute as to the facts, the only question is whether there is an abuse of discretion in dismissing the action in view of the particular circumstances of the case. The facts of this case reviewed, and the dismissal held not an abuse of discretion. (*Id.*)
3. **TRIAL—SUBMISSION OF CAUSE—AMENDMENT OF COMPLAINT—DISCRETION.**—The power given under section 473 of the Code of Civil Procedure to allow amendments in the interest of justice, is in the discretion of the trial court; and the appellate court will not disturb the allowance of an amendment to the complaint made by the trial court, after the submission of the cause, where no abuse of discretion appears. (*Lee v. Murphy*, 364.)
4. **CONTINUATION OF TRIAL—FURTHER TESTIMONY OF PLAINTIFF—MOTION TO STRIKE OUT—OBJECTION TOO BROAD—DISCRETION.**—Where

PRACTICE (Continued).

the complaint was amended after the submission of the cause, and the trial was then continued for further hearing of evidence, a motion to strike out all further testimony given by the plaintiff in support of the amended complaint, as showing in contradiction of the affidavit for the amendment that the facts testified to were all previously known, is properly denied on account of the objection being too broad, where a portion of the testimony given tended to establish other and independent facts; and it was matter in the discretion of the court as to what further relevant testimony to allow. (Id.)

See Appeal; Attachment; Bill of Exception; Claim and Delivery; Estates of Deceased Persons; Evidence; Execution; Findings; Instructions; Judgment; Jury and Jurors; New Trial; Place of Trial; Pleading; Summons.

PRE-EMPTION. See Quieting Title, 6.

PRIORITIES. See Mortgage, 30-32.

PROHIBITION. See Justice's Court; Municipal Corporation, 9.

PROMISSORY NOTE. See Guaranty; Mortgage, 15.

PUBLIC OFFICERS.

1. **COUNTIES — COMPENSATION OF SUPERVISORS — CONSTRUCTION OF STATUTE — ILLEGAL CLAIM FOR SERVICES — ATTENDANCE UPON ANTI-DEBRIS ASSOCIATION.**—The compensation of supervisors under the County Government Act, including the compensation "for *per diem* and mileage or other services rendered by them," was not intended to include any claim for services not coming within the duties of the board as prescribed by law; and no compensation can be allowed to a supervisor for services rendered and moneys expended by him as a representative of the board in attendance upon meetings of an anti-debris association formed by several counties to protect lands along the Feather, Yuba, and Bear rivers, against danger and damage from the results of hydraulic mining. (Irwin v. County of Yuba, 686.)
2. **CLAIM AGAINST COUNTY MUST BE AUTHORIZED BY LAW — BENEFIT IMMATERIAL.**—One who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which finds authority of law; and it is not sufficient that the services performed for which payment is claimed were beneficial. (Id.)
3. **COMPENSATION OF PUBLIC OFFICERS—EXTRA CHARGE NOT PERMISSIBLE.**—A person who accepts an office with compensation fixed by law is bound to discharge the duties of the office for such compensation without extra charge. (Id.)

See Irrigation District; Municipal Corporations.

QUIETING TITLE.

1. **ACTION TO QUIET TITLE—DEFENSE OF WRITTEN CONTRACT — FAILURE TO DENY GENUINENESS AND EXECUTION—EVIDENCE—MATTER IN**

QUIETING TITLE (Continued).

AVOIDANCE OF CONTRACT.—The failure of the plaintiff, in an action to quiet title, to file an affidavit denying the genuineness and due execution of a written contract pleaded and set forth in the answer by way of defense, merely admits that the instrument pleaded is not spurious or counterfeit, or of different import on its face from the one executed, but is the identical instrument executed by the plaintiff, and does not preclude the plaintiff from controverting the instrument by evidence of fraud, mistake, undue influence, or any matter in avoidance of the contract, not inconsistent with the fact of its execution and genuineness. (Moore v. Copp, 429.)

2. **ISSUES AGREED UPON — OBJECTION UPON APPEAL.**—Where issues as to matter in avoidance of the contract pleaded in defense, not involving its genuineness and due execution, were agreed upon and submitted to the jury without objection, the defendant cannot object upon appeal for the first time that such issues were not properly submitted. (Id.)
3. **PLEADING—FRAUD OR MISTAKE IN AVOIDANCE — REPLICATION AS MATTER OF LAW.**—A plaintiff is not required to plead the facts constituting fraud or mistake, unless the cause of action or defense to a cross-complaint rests thereon; and where such facts are merely matter in avoidance of a defense set up in the answer, they are not required to be averred in the complaint, but may be proved in rebuttal of the defense without a replication, which is supplied by operation of law. (Id.)
4. **EQUITY CASE—VERDICT OF JURY ADVISORY—RIGHT OF COURT TO DETERMINE QUESTION OF FRAUD.**—An action to quiet title, in which the defendant relies upon a contract for the sale of the premises in controversy, is purely an equity case, in which neither party has the right to demand a jury, and the verdict of a jury is merely advisory to the court, and, though actual fraud in avoidance of the contract is always a question of fact, yet the court is not bound by the verdict of the jury on that question, but may determine it regardless of the verdict. (Id.)
5. **MISTAKE OF FACT UPON PART OF PLAINTIFF—IGNORANCE OF PLAINTIFF—AGE, INFIRMITY, AND INEXPERIENCE—RELIANCE UPON DEFENDANT—KNOWLEDGE OF DEFENDANT.**—A contract may be set aside for a clear mistake of fact on the part of one of the parties, without proof of fraud of the other party; and where the evidence for the plaintiff showed that she was aged, subject to physical infirmities, and inexperienced in business, and had confidence and implicit trust in the defendant, who prepared the contract out of her presence, and brought it to her to be executed, bringing with him a notary and a witness, and, knowing that she did not know what was contained in the contract, did not read it to her, and that she signed it, without reading it, under the understanding and belief that it was a lease with an option of renewal, and in ignorance of the fact that it contained a contract of sale, the circumstances are such that ordinary prudence on the part of the defendant required him to have the contract read in her hearing, and the plaintiff should not be held to suffer for her apparent laches in signing it in ignorance of its contents. (Id.)

QUIETING TITLE (Continued).

6. EXECUTION SALE OF POSSESSORY RIGHT — TITLE ACQUIRED BY PRE-EMPTOR NOT AFFECTED. — A sale under execution against a pre-emptor who had obtained a government patent for the land prior to the sale, which did not purport to convey his title in fee, but was merely of "all the right, title, and interest" held by him on the date of the filing of an abstract of a judgment recovered against him in a justice's court, upon which the execution was issued, at which date the pre-emption settler had only a possessory claim to the land as such settler, and had not proved up or paid for the land, did not pass or affect the title acquired by him subsequently to that date, and he may maintain an action to quiet his title in fee as against the purchasers at the execution sale. (*Rupert v. Jones*, 111.)

See Mortgage, 39.

RECEIVER.

1. PARTNERSHIP — DISSOLUTION AND ACCOUNTING — INTERVENTION — DISPUTE AS TO PERSONS CONSTITUTING PARTNERSHIP — JUDGMENT FOR INTERVENORS — POWER OF RECEIVER — ACTION AGAINST BANK. — A receiver appointed at the instance of plaintiff in an action for an accounting and dissolution of an alleged partnership between plaintiff and defendant, to collect the assets of that partnership, has no power to institute an action against a bank to recover the proceeds of the sales of property belonging to a partnership between the defendant and one who had intervened in the action for an accounting and dissolution of partnership, averring that he was a partner with defendant in the alleged partnership business, and that plaintiff was not such partner, and in whose favor judgment had been rendered prior to the commencement of the action by the receiver, for a dissolution and accounting of the partnership between the intervenor and the defendant; and where such receiver, in the action against the bank, alleged special authority to collect such proceeds of sales as were held by the bank, a finding against such authority, which has support in the evidence, is fatal to any recovery by the receiver against the bank. (*Wheat v. Bank of California*, 4.)
2. PROMISE OF BANK TO INTERVENOR — WANT OF CONSIDERATION — NOTICE BY INTERVENOR — STATUS OF RECEIVER AND BANK NOT AFFECTED. — A promise made by the cashier of the bank to the intervenor and his attorney, that he would hold the fund sought to be recovered by the receiver until the litigation was fully determined, not supported by any consideration, is of no binding force and effect; and neither such promise, nor any notification given by the intervenor to the bank that he was a party to the litigation, and claimed an interest in the funds held by the bank, whatever rights purely personal to himself might be created thereby, could in any way affect the legal status between the receiver and the bank. (*Id.*)

RELEASE. See Mortgage, 2, 4-9.

SACRAMENTO. See Municipal Corporations, 9-12.

SALE.

1. **STATUTE OF FRAUDS — LACK OF DELIVERY AND CHANGE OF POSSESSION—TITLE OF VENDEE—TRANSFER—POSSESSION TAKEN BY BONA FIDE PURCHASER.**—A sale of personal property, though not followed by an immediate delivery and actual and continued change of possession, as required by section 3440 of the Civil Code, is not a nullity, but is good against all the world except the creditors of the vendor, and is good against them also except when attacked in legal proceedings for the collection of their debts; and the vendee, being the owner, can convey title thereto, and the purchaser would, in any event, acquire a title good against all the world except the creditors of the original vendor, and against them also if he was a purchaser in good faith, for value, and without notice of their claims, and had finally acquired possession of the property prior to the seizure of it, under attachment by them. (*Williams v. Borgwardt*, 80.)
2. **SALE OF PERSONAL PROPERTY BY AGENT—POWER OF ATTORNEY NOT EXCLUSIVE OF OTHER AUTHORITY—EVIDENCE— FINDING.**—Although a sale of personal property by an agent for the vendor may not be authorized by a written power of attorney given to the agent, it is not necessary that the authority to make the sale should be found in that instrument, nor could its provisions limit the power of the vendor to direct the sale in other modes; and the court may find that the authority of the agent existed in fact upon testimony to that effect. (*Id.*)
3. **CONSTRUCTION OF CODE — TRANSFER OF PROPERTY NOT IN POSSESSION OF VENDOR.**—Section 3440 of the Civil Code, requiring an immediate delivery and actual and continued change of possession of property sold, has no application where the property is not in the possession nor under the control of the vendor at the time of the sale; and it is sufficient if the vendee subsequently obtains possession of the property, as against creditors of a prior owner of the property, who sold to such vendor without delivery of possession. (*Id.*)
4. **PURCHASE FOR VALUE—PRESUMPTION OF GOOD FAITH.**—Where value is paid for the purchase of personal property, the purchase is presumed to be in good faith, and without notice of the rights of creditors of a prior owner, or of anything that could render the prior sale to his vendor fraudulent, in the absence of proof to the contrary. (*Id.*)
5. **SALE OF PROPERTY UNDER EXECUTION—PURCHASE BY VENDEE—ESTOPPEL.**—The purchase of personal property at execution sale by a *bona fide* purchaser from a vendor to whom no possession was delivered under sale from a prior owner, the execution having been issued upon a judgment rendered in an attachment suit brought by creditors of such prior owner, in which the property was attached while in possession of such *bona fide* purchaser, does not estop the purchaser from denying that the property was rightfully attached as the property of such prior owner. (*Id.*)
6. **REPLEVIN—DAMAGES—EFFECT OF RECOVERY OF PROPERTY BY PLAINTIFF—REVIEW UPON APPEAL.**—Although the fact that the plaintiff

SALE (Continued).

had recovered the possession of the property by purchase at an execution sale, before the trial of an action brought to replevy the property from the sheriff, may change the rule of damages, yet where no such point is made upon appeal, and the evidence shows that the amount of damages rendered is about the same as it would have been if the correct rule of damages had been followed, a reversal of the judgment is not called for upon that ground. (Id.)

7. **SEVERABLE CONTRACT—DIFFERENT ITEMS — ACCEPTANCE.**—A contract for the sale of different kinds of personal property, at an agreed price for the different items, is severable, in the absence of any thing in the contract to show that the sale of one item was contingent upon the sale of the others, or that the contract was for any other reason an entirety; and the refusal of the purchaser to accept a tender of one of the items does not operate to waive or excuse performance or offer of performance, by the seller as to the other items. (Herzog v. Purdy, 99.)
8. **RESALE BY SELLER—PERFORMANCE.**—Upon the refusal of the purchaser to accept a tender as to one of the items, a resale by the seller of all the property incapacitates him from any performance whatever, and releases the purchaser from the necessity of further demand or tender of performance as to the other items, and as to them subjects the seller to liability. (Id.)
9. **PART PAYMENT—FORFEITURE.**—Where, at the time of the execution of such contract, the buyer made a payment which the seller receipted for "on account," the subsequent refusal of the buyer to accept one of the items does not work a forfeiture of the payment, but it is his right to have it applied on the price of any of the items which he accepted. (Id.)

See Contract, 1, 2, 5-8, 13-16; Damages; Specific Performance, 3.

SAN FRANCISCO. See Home for Inebriates.

SHERIFF. See Execution, 1, 2.

SPECIFIC PERFORMANCE.

1. **MUTUALITY OF REMEDY.**—While it is a general rule that mutuality of remedy is essential to authorize the specific performance of a contract, this rule does not require that such mutuality shall exist in all cases at the inception of the transaction. (Thurber v. Meves, 35.)
2. **CONTRACT FOR PERSONAL SERVICES.**—A contract for the conveyance of land, in consideration of personal services to be performed by the vendee, may be specifically enforced at the instance of the latter, after such services have been fully or substantially performed. (Id.)
3. **CONTRACT FOR SALE AS SECURITY FOR LOAN—EQUITABLE MORTGAGE —TIME OF PAYMENT.**—Where, after the making of a contract for the sale of land, in consideration of personal services to be performed by the vendee, the latter borrows a sum of money from the

SPECIFIC PERFORMANCE (Continued).

vendor, to be repaid at a particular date, and to secure the payment thereof agrees that the contract for sale should be held as security for the payment of the loan, and that the right to the conveyance should be dependent upon the payment thereof at the times and in the manner mentioned in the contract of loan, in addition to the other conditions precedent to the conveyance, such second agreement is in the nature of a mere equitable mortgage to secure the payment of the loan, and as its purpose could not be defeated by a mere failure to pay in accordance with its terms, a failure to pay on the day specified would not defeat the vendee's right to a specific performance of the contract for sale. (Id.)

See Trust, 2.

STATUTES.

CONSTITUTIONAL LAW—POWER OF LEGISLATURE—RETROSPECTIVE OPERATION OF STATUTES—PRESUMPTION.—Though the legislature has power to give to statutes a retrospective operation, if they are not *ex post facto*, and do not impair the obligation of contracts, or deprive any one of vested rights, yet it is to be presumed that no statute, is intended to have such effect, unless the contrary clearly appears, and especially so where to give the statute retrospective effect would work manifest injustice. (Pignaz v. Burnett, 157.)

STATUTE OF FRAUDS. See Contract, 8; Sale, 1; Trust, 3.

STATUTE OF LIMITATIONS.

1. COUNTERCLAIM — PLEADING — DEMURRER — DEFENSE TO COUNTERCLAIM—RECORD UPON APPEAL—PRESUMPTION.—The statute of limitations is a personal privilege which is waived, unless specially pleaded; and, where a counterclaim appears upon the face of the answer to be barred by the statute of limitations, it must be specially pleaded to by demurrer on that ground, else it is waived; and if it does not so appear, in order that it may be availed of upon appeal as a defense to the counterclaim, and that reversible error may be shown in sustaining the counterclaim, it is incumbent upon the plaintiff to show in the record upon appeal that the statute of limitations was urged in the court below and relied upon as a defense to the counterclaim, else it will be assumed upon appeal that no such defense was made or claimed. (Bliss v. Sneath, 526.)
2. ACTION FOR RENT—COUNTERCLAIM FOR DIVISION FENCE—PERIOD OF LIMITATION—STATUTORY LIABILITY.—In an action for rent, a counterclaim for a division fence constructed by the defendant upon contiguous land and used by the plaintiff is upon a liability created by statute, and is not barred short of three years from the date of the inclosure of plaintiff's land whereby the division fence was utilized; and it is immaterial that it may be deemed a cause of action upon contract within the law of setoff and counterclaim. (Id.)
3. ADVERSE POSSESSION — PRESCRIPTION — PUBLIC USE. — No title could be acquired by the plaintiff by adverse possession under the

STATUTE OF LIMITATIONS (Continued).

statute of limitations, or by prescription to a lot dedicated to public use. (*Home for Care of Inebriates v. San Francisco*, 534.)

See Adverse Possession; Estates of Deceased Persons, 1; Mortgage, 38, 39.

STAY OF PROCEEDINGS. See Criminal Law, 7-12.

STOCK AND STOCKHOLDERS. See Contract, 13-16; Corporations.

STREET ASSESSMENT.

1. **BOUNDARIES OF DISTRICT — DESCRIPTION IN RESOLUTION OF INTENTION — ANGLES AND DIRECTIONS CONTROLLED BY STREETS AND FIXED POINTS.**—In determining the validity of a street assessment, the boundaries of the assessment district fixed by the resolution of intention will not be construed as not including a definite piece of land, merely because the calls for the angles and directions of the lines are at variance with the calls for streets and fixed points upon them, but the streets will be considered as monuments controlling the angles which they or their parallels are supposed to make with each other, and a fixed point on a street will control the direction of a line supposed to be parallel with another street, and it is sufficient if a surveyor, by rejecting the erroneous calls for angles and directions, can definitely locate the boundaries of the assessment district by means of the streets and fixed points upon them. (*Thomason v. Cuneo*, 25.)
2. **STREET IMPROVEMENT—RIGHT OF ELECTION OF OWNERS—PREMATURE CONTRACT INVALID—VOID ASSESSMENT.**—Under section 5 of the street improvement act of 1889, which provides for a right of election of the owners of three-fourths of the frontage to take the work of a proposed street improvement and to enter into a written contract therefor within a specified period, and that if they fail so to elect and contract within such period, the superintendent of streets shall enter into a contract with the original bidder to whom the contract was awarded, until the expiration of the period within which the owners are allowed to enter into the contract, the superintendent of streets has no power to enter into a contract with the bidder and a contract entered into with him prior to expiration of that time is invalid, and cannot form the basis of an assessment. (*California Improvement Co. v. Quinchard*, 87.)
3. **STREET WORK REQUESTED IN FRONT OF LOT—LIEN CONFINED TO CITY OR TOWN — INSUFFICIENT COMPLAINT — DEMURRER — UNCERTAINTY.**—The lien provided for in section 1191 of the Code of Civil Procedure, in favor of one who, at the request of the owner of a lot, improves the street or sidewalk in front of or adjoining the same, can be acquired and enforced only against a lot in an "incorporated city or town"; and a complaint to enforce such a lien, setting forth a contract for grading and other work, which shows upon its face that the work was to be done outside of any city or town, and was to be done in accordance with an ordinance

STREET ASSESSMENT (Continued).

to be passed by the board of supervisors of the county, does not state a cause of action; and if such complaint leaves it uncertain whether the work to be done under the contract was within an incorporated city or town, and uncertain as to whether an ordinance was passed by the board of supervisors of the county, it is subject to a demurrer for uncertainty. (*Durrell v. Dooner*, 411.)

4. OMISSION TO REQUEST AMENDMENT—OBJECTION UPON APPEAL.—The omission to request an amendment to a pleading after a demurrer thereto has been sustained precludes the making of an objection upon appeal for the first time that the court should have allowed an amendment, when nothing appears in the record to show an abuse of discretion. (*Id.*)
5. STREET IMPROVEMENT—CONSTRUCTION OF SEWER—RESOLUTION OF INTENTION—COMPENSATION OF CITY ENGINEER—PAYMENT TO SUPERINTENDENT OF STREETS—WORK OF FORMER ENGINEER UNDER ABANDONED RESOLUTION—MANDAMUS.—Under the act of 1889, p. 162, which provides for work upon streets, etc., and for the construction of sewers within municipalities, the resolution of intention under which the work of the construction of a sewer is done, is the only foundation for the jurisdiction of the board to proceed with the work, and all "incidental expenses," including the compensation of the city engineer, which are required to be advanced by the contractor to the superintendent, for payment by him, are necessarily connected with the work done in the proceedings had under and in connection with such resolution, and property holders cannot be burdened with expenses incurred under any former abandoned resolution, nor can the compensation of a former city engineer for work done and plans and specifications and diagram prepared by him for the proposed construction of the same sewer under a former abandoned resolution be considered or taken as any part of the "incidental expenses" advanced by the contractor to the superintendent of streets, under a subsequent resolution of intention which was carried out, and the superintendent of streets may be compelled by *mandamus* to pay the compensation advanced for the city engineer to the one who acted under the latter resolution. (*Fitzhugh v. Ashworth*, 393.)
6. REFERENCE IN RESOLUTION TO FORMER PLANS—AID TO NEW CITY ENGINEER.—Plans and specifications do not constitute a necessary part of a resolution of intention, and, when specified therein, are superfluous, and need not be followed; and the fact that a subsequent resolution of intention to construct a sewer refers to the former plans and specifications prepared by a former city engineer under an abandoned resolution does not make the compensation of such former engineer any part of the incidental expenses to be advanced to the superintendent of streets under the subsequent resolution; and when the board ordered the new city engineer to make plans, specifications, diagram, etc., under such resolution, and the work was completed thereunder, the fact that the new city engineer was aided to some extent by the plans, maps, drawings, etc., made

STREET ASSESSMENT (Continued).

by the former engineer, does not entitle the compensation of the former engineer to be included in the incidental expenses so advanced, whatever other legal remedy, if any, he may have therefor. (Id.)

7. **MANDAMUS—DUTY ENJOINED BY LAW UPON SUPERINTENDENT OF STREETS—PAYMENT OF MONEY ADVANCED.**—Money advanced to the superintendent of streets by the contractor to cover the compensation of the city engineer as part of the "incidental expenses" required by law to be so advanced to the superintendent of streets, is held by the superintendent of streets in his official capacity, and it is a duty enjoined upon him by law to pay the sum to the party entitled thereto; and *mandamus* is a proper proceeding to enforce the rights of such party. (Id.)
8. **STREET IMPROVEMENT—ACCEPTANCE OF STREET — JURISDICTION OF CITY COUNCIL — PUBLIC EXPENSE — CONSTRUCTION OF STATUTE—MODE OF PROCEDURE.**—Notwithstanding the acceptance of a street, the city council still retains jurisdiction, under the street improvement act of March 18, 1885, to order its improvement, and the provision in section 20 of that act, requiring the municipality to improve such street at the public expense, is subordinate to the provision in section 2 of the same act, that the city may order such improvement whenever the public interest or convenience may require, and also to the provision in section 1 that when such order is made the work must be done under the proceedings prescribed in the act, and the contract for doing the work must be let to the lowest responsible bidder, after proposals have been invited under the provisions of section 5 of the act. (*Flickinger v. Fay*, 590.)
9. **AWARD OF CONTRACT—INJUNCTION—REMEDY FOR ILLEGAL ASSESSMENT.**—The city council having jurisdiction to award a contract for the improvement of an accepted street, the contractor to whom it is awarded cannot be enjoined, at the instance of owners of property fronting on the street, from performing the contract, upon the ground that by reason of the acceptance of the street, the cost of the improvement should be borne at the public expense, and not assessed upon adjacent lands; but such question is to be determined after the work under the contract is completed, when, if an assessment is attempted and cannot be legally made, an appropriate remedy may be had to defeat it. (Id.)

STREETS, ROADS, AND HIGHWAYS.

1. **INJUNCTION—ACTION TO RESTRAIN CITY FROM GRADING LANDS OF PLAINTIFF—DISPUTE AS TO LOCATION OF STREET—PRIMA FACIE EVIDENCE—BURDEN OF PROOF — SHOWING TO WARRANT REVERSAL.** — In an action to restrain a city from entering upon the lands of plaintiffs for the purpose of grading a street, where there is evidence tending to show that plaintiffs had both title and possession of the disputed strip, over which the city claimed that the street should be located, and that the street as actually located and used by the public for more than twenty years, was an open street of

STREETS, ROADS AND HIGHWAYS (Continued).

sixty feet in width, by which plaintiff's lot was bounded, and on both sides of which lots were fenced in during that period, the burden is on the city to overcome such *prima facie* evidence of title in plaintiff to the disputed strip of land, by clear proof of the title of the city thereto, and such proof must be uncontradicted by plaintiff's evidence, in order to warrant reversal of a judgment for the plaintiffs. (*Oglesby v. Santa Barbara*, 114.)

2. **CONFLICTING EVIDENCE—LINES OF STREET ESTABLISHED BY SURVEY—SUBSEQUENT SURVEY—FINDINGS—APPEAL.**—Where the evidence is conflicting as to the true original location of the street in controversy, but there is evidence tending to show an actual survey of the street by the town surveyor, taking the admitted base and initial point of the original survey, and that the fences and improvements on both sides of the street were made in accordance with such survey, leaving the street of full width, proof of a subsequent survey by another town surveyor, showing a different location of the street, only raises a conflict of evidence, and a finding of the court as to the correctness of the prior survey, having support in the evidence cannot be disturbed upon appeal. (*Id.*)
3. **TWO METHODS OF SURVEY—PROVINCE OF COURT.**—The court, having the facts before it as to two methods of ascertaining the lines of the street, had the right to judge as to which method of survey was the most satisfactory, and nearest in conformity with the actual original location; but it is not for the appellate court to determine that the true location of the street must in all cases be ascertained in the method approved by the trial court. (*Id.*)

See *Eminent Domain*.

SUMMONS.

1. **AFFIDAVIT FOR PUBLICATION—RETURN OF SHERIFF NOT REQUIRED.**—Where the complaint states a good cause of action, an affidavit for the publication of summons which gives the names of the defendants, and states that they reside out of the state, names the state in which each resides, and refers to the verified complaint and makes it a part of the affidavit, and states that the defendants are proper and necessary parties to the action, and that affiant has a good cause of action against the defendants, as he is advised by his counsel and verily believes, is not defective, and need not state that the sheriff had returned the summons, and it is not material whether the summons had been returned when the affidavit was made. (*Woodward v. Brown*, 283.)
2. **PROOF OF PUBLICATION—AFFIDAVIT OF PUBLISHER AND PROPRIETOR.** An affidavit proving publication of the summons may be sworn to by the publisher and proprietor of the paper in which it was published, such "proprietor" being in the sense of the statute synonymous with "printer"; and where such affidavit states that the summons was published weekly in a paper named, which was a daily and weekly newspaper, in each and every one of the con-

SUMMONS (Continued).

secutive weekly issues of said newspaper, and the time of publication stated covered twenty weekly insertions, and a period of seventy days, the affidavit shows a sufficient length of publication, and that the publication was once a week. (Id.)

3. **AFFIDAVIT OF SERVICE—EX PARTE AMENDMENT NUNC PRO TUNC.**—An affidavit of the personal service of summons may be amended by leave of the court after judgment, to supply *nunc pro tunc* the statement omitted by inadvertence that affiant was over the age of eighteen years when he made the affidavit; and though the practice of allowing such an amendment to be made without notice is not to be commended, yet where it was allowed *ex parte*, and the defendants had subsequent notice and full opportunity to take steps to have the truth of the matter ascertained, and did not ask to have the order vacated for any reason, or controvert any fact stated therein, the *ex parte* order allowing the amendment, and directing that the amended affidavit be made part of the judgment roll, will not be disturbed upon appeal. (Id.)
4. **AMENDMENT OF COMPLAINT AFTER PUBLICATION OF SUMMONS—MATTER NOT OF SUBSTANCE.**—An amendment of the complaint in matter of form after the publication of summons, merely setting out the indorsements of payments on the notes, in the nature of a bill of particulars from which it could be ascertained what appeared in the complaint, does not come within the rules that an amendment in matter of substance after default opens up the default, and such amendment does not require republication of the summons nor service upon absent defendants. (Id.)

See Judgment, 6; Practice, 1, 2.

SUPERIOR COURT. See Justices' Court.

SURETIES.

INJUNCTION BOND—PREVIOUS ISSUANCE OF RESTRAINING ORDER—CONSIDERATION—ORDER FOR BOND UPON MOTION OF DEFENDANT—RECITALS.—Where a restraining order was issued in a United States circuit court without requiring the plaintiff to execute a bond, and a bond was subsequently required to be given upon motion of the defendant by an order which did not purport to make the continuance of the restraint conditional upon the giving of the bond, and where the bond given recited the issuance of the restraining order and the order requiring the bond, and that it was given "in consideration of the premises, and of the issuance of the restraining order," but did not recite that it was executed to obtain a continuance of the restraining order, such bond is void for want of consideration, and no action can be maintained thereupon, and a judgment thereon will be reversed. (Alaska Imp. Co. v. Hirsch, 249.)

• See Attachment; Guaranty.

SWAMP LANDS.

1. **TITLE AND CONTROL OF STATE — PROCEEDS OF SALE — COUNTY SWAMP LAND FUND—TRUST—AGENCY FOR STATE.**—The

SWAMP LANDS (Continued).

swamp and overflowed lands were granted to the state by the act of Congress of September 28, 1850, and the title was thereby vested in the state, for the purpose of enabling it to reclaim the lands by means of levees and drains; and the control of the swamp lands and of the proceeds of their sale being in the state, without power in anyone but the United States to question the disposal made of the lands or their proceeds, no person and no county has any control over or interest in either lands or their proceeds except as the state has granted it. The state has not granted any swamp lands to the counties nor any funds arising from the sale of swamp lands therein, and the establishment of a swamp land fund in the various counties where swamp land districts have been formed was the creation by the state of a trust fund, making the counties and county officials mere agencies of the state, used by it in carrying out the purpose of reclamation, and the state may alter or amend its laws relating to the subject and control the custody of the fund at its pleasure. (County of Kings v. County of Tulare, 509.)

2. **DIVISION OF COUNTY—CUSTODY OF SWAMP LAND FUND—ACTION BY NEW COUNTY NOT MAINTAINABLE.**—Upon the division of a county no provision has been made by law for any change in the custody of the swamp land fund of the original county; and it cannot be claimed in such case that the trust has failed for want of a trustee, nor is there any ground for equitable interposition, but the legislature is the appropriate and only source of relief; and no action will lie on behalf of the new county to recover a share of such fund. (Id.)

TAXATION.

1. **ASSESSMENT OF PERSONAL PROPERTY—COLLECTION BY ASSESSOR—VALIDITY OF STATUTE—CONSTITUTIONAL LAW.**—The statute requiring the assessor to collect the taxes assessed upon personal property at the time of the assessment, upon the basis of the levy of the previous year, where the taxes are not secured by lien upon real estate, with a provision for remission of any excess in the levy, is constitutional and valid, and neither conflicts with article XIII of the constitution, requiring property to be taxed in proportion to its value, to be ascertained as provided by law, nor with subdivision 10 of section 25 of article IV, which prohibits the legislature from passing local or special laws for the assessment or collection of taxes. [Van Fleet, J., and Harrison J., dissenting.] (Rode v. Siebe, 518.)
2. **HARDSHIP NOT TO BE CONSIDERED.**—The fact that a law may work hardship in extreme cases cannot be considered in determining its validity. (Id.)
3. **SPECIAL LEGISLATION—GENERAL LAW—CLASSIFICATION — SECURED AND UNSECURED TAXES.**—The distinction between secured and unsecured taxes is intrinsic, and justifies a classification based thereupon; and a law providing for the collection of unsecured taxes upon personal property at a different time and in a different manner from the collection of taxes upon personal property, which are secured by lien upon real estate, is general and uniform in its opera-

TAXATION (Continued).

tion, and is not a special law for the collection of taxes within the meaning of the constitution. (Id.)

4. **COLLECTION OF PERSONAL PROPERTY TAXES BY ASSESSOR—CONSTITUTIONAL LAW—CASE AFFIRMED.**—That part of the revenue laws which provides for the payment of taxes on personal property by those who do not own real estate, and for the collection thereof by the assessor at the time of the assessment is constitutional and valid. (*Pacific Postal Tel. Cable Co. v. Dalton*, 604.)
5. **FRAUDULENT VALUATION BY ASSESSOR—INJUNCTION TO RESTRAIN COLLECTION — SUFFICIENCY OF COMPLAINT.** — A complaint which shows a fraudulent assessment of the personal property of the plaintiff by the assessor, at a valuation greatly in excess of its actual value, and greatly above that placed by the assessors on similar property of others, with intent to oppress the plaintiff and to compel plaintiff to bear an excessive share of the burden of taxation, and alleging a tender to the assessor of the just amount of taxes conceded to be due, sufficiently states a cause of action to restrain the assessor from proceeding to collect the taxes assessed, as against a general demurrer, though as against a special demurrer it might have been made more definite and precise to the point that the assessment was not made from mere error of judgment. (Id.)
6. **TAX DEED—RECITALS, HOW FAR REQUIRED—MODE OF OFFERING LAND FOR SALE—SALE OF SMALLEST QUANTITY FOR TAX—PRIMA FACIE EVIDENCE.**—The matters now necessary to be recited in a tax deed are those prescribed by sections 3776, 3785, and 3786 of the Political Code, and none other; and it is nowhere required under the present law that the mode of offering the land for sale shall be stated in the deed, as was formerly required, so as to show affirmatively that the officer sold the smallest quantity which any purchaser would take and pay the taxes; and where the deed contains the recitals made imperative by the Political Code, and shows that the purchaser paid the full amount of the unpaid delinquent tax, together with the costs and charges for the property sold, and recites "that said sale was conducted in the manner prescribed by law," there being nothing in the deed to show that the land sold was not the least quantity which any person would take and pay the taxes, such fact is presumed, and the deed is, by virtue of the express declaration of section 3786 of the Political Code, *prima facie* evidence that "the property was sold as prescribed by law. (*Hayes v. Ducasse*, 682.)
7. **PUBLICATION OF NOTICE OF SALE—PRESUMPTION—RECITAL NOT REQUIRED.**—A recital of the publication of the notice of sale is not among those expressly required by law to appear in the deed, and when the deed contains nothing to show that the notice was not published, the due publication thereof, is included in the presumption from the presence of the essential recitals in the deed that at the proper time and place the property was sold as prescribed by law. (Id.)

See Adverse Possession; Boundaries, 6; Irrigation District; Mortgage, 36; Municipal Corporations, 16.

TRUST.

1. **STOCK OF CORPORATION—ENFORCEMENT OF TRUST BY ADMINISTRATOR OF BENEFICIARY.**—Where shares of the stock of a corporation had been pledged by the original owner as security for payment of his note and had been sold to satisfy the note, and the purchaser was willing and desirous to allow the original owner the benefit of a great rise in the value of the stock, upon payment of a specified sum therefor, and such sum was advanced by the defendant under an agreement that the original owner of the stock should procure it to be transferred to the defendant to be held by him for the benefit of the original owner, upon the trust and condition that, such original owner, upon the tender by him to the defendant within six months of the sum so advanced with interest from the date of advance, and a specified bonus, should receive from the defendant a transfer of all of said stock, and such original owner died before the expiration of the time limited, an action will lie in favor of his administrator, after tender to the defendant of the amount so agreed upon, to enforce the trust, and to compel a re-transfer of the stock by the defendant pursuant to the agreement. (*Sayward v. Houghton*, 545.)
2. **SPECIFIC PERFORMANCE OF CONTRACT — OPTION—MUTUALITY—EFFECT OF TENDER.** — Assuming that the element of mutuality was wanting in the contract sought to be enforced at the time the contract was entered into, and that it only conferred upon the original owner of the stock an option to pay the money, that element was supplied upon the offer of performance and tender of the amount agreed upon by his administrator, at which time the remedy became mutual. An original lack of mutuality in the right to specific performance of a contract will not preclude the enforcement of the contract where this want has been removed at the time the action was brought. (*Id.*)
3. **CREATION OF TRUST—CONSIDERATION—STATUTE OF FRAUDS.** — The transaction between the defendant and the original owner of the stock was not in effect a purchase of the stock by the defendant from the prior purchaser with a mere promise without consideration to hold it for the benefit of the original owner; but in legal effect it amounted to a purchase of the stock by the original owner with money advanced by the defendant, the title to the stock being taken in the name of the latter as security for the repayment of the money so advanced, with the stipulated compensation for its use, and there was no want of consideration for the promise to return or transfer the stock, nor was there anything in the nature of the contract rendering it obnoxious to the statute of frauds; but a trust arose upon the facts in favor of plaintiff's intestate to have the stock restored to him upon compliance with the terms of the contract. (*Id.*)
4. **RIGHT OF ADMINISTRATOR TO SUE—OFFER OF PAYMENT.** — The administrator of the deceased beneficiary of the trust may maintain an action to enforce the trust, upon compliance with the contract creating it on his part, and an offer or tender of payment by such administrator to the defendant of the sum agreed upon, within the

TRUST (Continued).

time limited by the contract, is sufficient to authorize the maintenance of such action. (Id.)

5. **CONSTRUCTION OF CODE—MODE OF TENDER.** — Section 1500 of the Civil Code does not prescribe the mode of tender, but a method of extinguishing an obligation when that object is sought. (Id.)
6. **TRUST TO MANAGE PROPERTY AND PAY OVER AND DELIVER THE SAME—POWER OF TRUSTEES.**—A trust to manage property and deliver the same to beneficiaries named at their majority, in the absence of any other authority given expressly or by implication in the instrument creating the trust, requires that the property be kept and delivered in kind to the beneficiaries at the termination of the trust; and though a right to receive payment of bonds and mortgages, and to invest the sums so received in other securities, is consistent with the duty of the trustees to pay over and deliver the property held upon trust, their authority cannot be extended to include a right to sell or dispose of real estate so held by them upon trust, without a previous order or direction from the court. (Goad v. Montgomery, 552.)
7. **POWER OF SALE BY EXECUTORS NOT APPLICABLE TO TRUST PROPERTY DISTRIBUTED TO TRUSTEES.**—The rights and duties of executors are distinct from their rights and duties as trustees under the will, and a power of sale given to the executors as such is not applicable to trust property distributed to them as trustees under the will, and where no such power is conferred upon the trustees by the decree of distribution, it must be deemed not to exist in them as trustees under the will. (Id.)
8. **VOID TRUST UNDER WILL—SUSPENSION OF POWER OF ALIENATION.**—A trust attempted to be created under the will of a testator, for the benefit of his children, by the terms of which the trustee was to divide the net income of the residue of his estate in equal shares among them to the survivors of them (the issue of any deceased child to share in such distribution by right of representation) until the younger son, then aged seventeen years, shall, or would if living, reach the age of thirty years, and at the expiration of such time to divide and distribute the said residue of his estate in equal shares among such of his children as may then be living, and the issue of any deceased child, such issue to share in the distribution *per stirpes* and not *per capita*, is void, as suspending the power of alienation for a time certain, and not dependent upon any life or lives in being. (Estate of Cavarly, 406.)
9. **CONSTRUCTION OF STATUTE —PERPETUITIES — FUTURE ESTATES — TIME OF VESTING—REMOTENESS—ALIENABILITY.**—Our statute prohibiting the suspension of the power of alienation is not, properly speaking, against perpetuities, but simply prohibits, restraints upon alienation, and makes a future estate void in its creation, if, by any possibility it may suspend the power of alienation beyond the prescribed period regardless of the time of vesting of such estate; nor does it insist upon the vesting of estates, but only upon their alienability, and the doctrine of remoteness has no materiality, except as it affects alienability. (Id.)

TRUST (Continued).

10. **VOID POSTPONEMENT OF POSSESSION—INVALIDITY OF TRUST—RULES OF CONSTRUCTION—INTENTION OF TESTATOR.**—The rule that when an absolute estate is granted, but the right of possession and enjoyment is postponed, solely for the supposed benefit of the grantee, such postponement is void, as applied to future estates vesting in the issue of the children of the testator under the will, cannot affect the invalidity of the trust attempted to be created by the will, which if valid, would operate to suspend the power of alienation for a fixed period; but the rule that when a testamentary disposition is made to a class, and possession is postponed, it includes all persons within the class at the time to which possession is postponed, and the rule of construction of a gift to a class that only those are included who are in existence at the time of the distribution, and the further rule that the word "issue" ordinarily means descendants to any degree, are in harmony with the testator's manifest intent, disclosed by the terms of the will to keep the property in his family and beyond the power of his descendants to dispose of for the prescribed period, and the case is clearly within the prohibition of the statute against the suspension of power of alienation. (Id.)
11. **ESTATES OF DECEASED PERSONS—TRUSTS UNDER WILL—CONCLUSIVE-NESS OF DECREE OF DISTRIBUTION—COLLATERAL ATTACK—VALIDITY OF TRUSTS—SETTLEMENT OF ACCOUNTS OF TRUSTEES.**—A decree of distribution to trustees named in the will is a judicial construction of the will, and is a determination of the rights of all parties interested in the estate, and is a measure of their rights, and the will can no longer be considered except upon a direct appeal from the decree, and, though erroneous, if it is unappealed from, the decree is conclusive upon all persons interested in the estate; and minor beneficiaries of the trust, whose rights were limited by the decree to one-third of the estate, the other two-thirds having been distributed to other beneficiaries under trusts, the validity of which was determined by the decree of distribution, cannot attack such other trusts collaterally upon a settlement of the accounts of the trustees, upon the ground that they were void as being in restraint of alienation, and that the trustees should account for the whole estate for the benefit of the minors. (Matter of Trescony, 568.)
12. **PARTITION OF LAND HELD IN TRUST—CONCLUSIVENESS OF DECREE—ACCOUNTS OF TRUSTEES.**—A decree of partition of the land in which the trustees held an undivided interest in trust, in an action in which the court had jurisdiction of all the parties interested in the land, allotting different portions of it in severalty to the several parties before it, is a determination of the rights of the parties, which became conclusive of their rights, where no appeal was taken therefrom; and accounts of the trustees embracing all of the land allotted to them by such decree in trust for the beneficiaries, represented by them, cannot be objected to as not embracing the whole of the trust estate. (Id.)

See Debtor and Creditor; Estates of Deceased Persons, 3-8, 13, 27-29; Will.

VENDOR'S LIEN. See Mortgage, 28.

VENUE. See Place of Trial.

WARRANT. See Irrigation District, 2, 3.

WATER AND WATER RIGHTS. See Damages; Injunction, 2, 3.

WHITTIER STATE SCHOOL. See Criminal Law, 1, 2.

WILL.

1. CONSTRUCTION OF WILL—SUBSTITUTED LEGACY—INCIDENTS AND LIMITATIONS OF ORIGINAL LEGACY—DEATH OF LEGATEE—CODICIL—REFERENCE TO ORIGINAL BEQUEST.—One of the rules for the construction of a will is that a substituted or additional legacy, although not so expressed in the testamentary instrument, is *prima facie* payable out of the same funds and subject to the same incidents and conditions as is the original legacy, irrespective of whether the result is or is not advantageous to the legatee; and this rule is to be applied where a legacy lapsed through the death of the legatee prior to the death of the testator, is bequeathed to a substituted legatee, in a codicil, if nothing appears from the language used in the codicil or from the application of other recognized rules for the construction of wills, to indicate that the testator intended a substantive and independent bequest; and where the amount of the legacy is not specified in the codicil, otherwise than by reference to the original will, it cannot be so considered. (Estate of De Laveaga, 651.)
2. LAPSE OF TIME IMMATERIAL—LEGACY PAYABLE OUT OF PARTICULAR PROPERTY.—The rights of a substituted legatee named in a codicil are not enlarged by lapse of time after the execution of the will establishing the original legacy; and where the original legacy is payable only out of the proceeds of sale of a particular piece of land, the substituted legatee is limited by the condition attached to the original legacy, notwithstanding the lapse of several years between the execution of the will and that of the codicil. (Id.)
3. REVOCATION OF LIFE ESTATE BEQUEATHED TO SUBSTITUTED LEGATEE. The fact that a life estate in another parcel of land, before devised to the substituted legatee, was revoked, and devised to another person, cannot affect or enlarge the rights of the substituted legatee, where the language used does not indicate that the legacy was given in lieu of the life estate. (Id.)
4. ESTATES OF DECEASED PERSONS—TRUST UNDER WILL—CONSTRUCTION—ANNUITIES—COMMENCEMENT AT DEATH OF TESTATOR—TIME OF PAYMENT.—Where a trust created under a will has but seven years to run and the will provided that the beneficiaries should receive annuities from the trustees for seven years, and there appears no express intention to fix upon another time for the commencement of the annuities, they must be held to commence at the decease of the testator, in accordance with section 1368 of the Civil Code; and a clause in the will providing for payment of annuities as soon as

WILL (Continued).

the trustees should have sufficient funds available for that purpose is to be construed as relating only to the time of payment, and not to the date when the annuities begin to run. (*Crew v. Pratt*, 131.)

5. **CLASSIFICATION OF ANNUITIES—FIRST CHARGE—FAILURE OF FUNDS—RESORT TO GENERAL ASSETS.**—The fact that the annuities were classified, and six of them were subordinate to the first four, which were made a first charge upon any moneys in the hands of the trustees, does not require that the charge upon the revenue of each year shall be borne only by the revenue of that year, or affect the obligation of the trustees, to pay each and all of the annuities as of the date of the death of the testator, whenever and so long as there are sufficient funds or assets of the trust estate to meet them; and, under subdivision 3 of section 1357 of the Civil Code, if the fund or property out of which any annuities are payable fails, resort may be had to the general assets, as in case of a general legacy. (*Id.*)

6. **TEMPORARY FAMILY ALLOWANCE—PAYMENTS AFTER RETURN OF INVENTORY—SETTLEMENT OF FINAL ACCOUNT—ANNUITY TO WIDOW—OFFSET.**—Where a family allowance was made to the widow prior to the return of the inventory, although such allowance is in its nature temporary, and only continues until the return of the inventory, and although payments made thereon after the return of the inventory are at the peril of the executors, yet the court has power to credit the executors with any reasonable sum of money thus expended, and where they are credited therewith in their final account, and no appeal is taken from the order of settlement, the question of family allowance to the widow is adjudicated, and the adjudication cannot be attacked collaterally, nor can any offset be claimed to an annuity payable to the widow from the date of the death of the testator, on account of payments made to her for family allowance after the return of the inventory. (*Id.*)

See *Estates of Deceased Persons; Guardian and Ward; Trust*, 8-12.

WRIT OF ASSISTANCE. See *Mortgage*, 20.





